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TREATISE ON PLEADING

AND

PARTIES TO ACTIONS,

WITH

SECOND AND THIRD VOLUMES

CONTAINING

MODERN PRECEDENTS OF PLEADINGS,

AND

Practical Notes.

NIHIL SIMUL INVENTUM EST ET PERFECTUM.—*Co. Lit.* 230 *a.*

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TO

THE THIRD VOLUME OF THE SEVENTH EDITION.

MORE than one hundred of the Forms inserted in the Third Volume of the last edition of this work have been omitted in the present, either on account of their having become inapplicable by reason of recent statutes, or of their having been decided to be bad on demurrer; upwards of two hundred new Forms have been added, and very considerable additions have been made to the notes, which have been extended by references to more than one thousand modern cases. Most of the new Forms have received the sanction of judicial authority; but, where this is not the case, the Precedents, as stated by the learned Author in his Preface to the last edition of the Third Volume, must be considered as published *only to assist* in preparing Forms of Pleadings, every practitioner being expected to exercise his own judgment when he uses the work, and carefully to examine the statutes and cases referred to in the notes.

H. G.

KING'S BENCH WALK,
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VOL. III.

I. SUGGESTIONS OF DEATHS, &c.

Observations on abolition of imparlances, and suggestions of death or other event *pending* the action.

THE formal statement of *imparlances* has, as regards *Personal Actions* in the Superior Courts, been virtually abolished (*a*) by Reg. Gen. Hil. Term, 4 W. 4, reg. 2, which orders "That no entry of continuances by way of *imparlance*, curia advisari vult, vice comes non misit breve, *or* otherwise, shall be made;" but provides that *matters of defence, arising pending an action, may be pleaded* with an allegation that the matter arose *after the last pleading*, or the issuing of the jury process (*a*). There are *modes* of stating at the head of any pleading a *death*, or *change of attorney*, or *other event*, occurring pending an action, and sometimes such statement is absolutely essential to be made in due time. The 8 and 9 W. 3, c. 11, sect. 7, enacts, that if there be two or more plaintiffs or defendants, and one or more of them should die, *if the cause of action should survive* to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, *but such death being suggested* on the record, the action shall proceed, &c. (*b*) In general, such death should be stated in the commencement of the very *next* part of pleading after it happened. And the Reg. Gen. Hil. Term, 4 W. 4, reg. 2, requires every *matter of defence* that has arisen *pending an action* to be pleaded, with an *affidavit* that such matter of defence arose not only *since the last pleading* or the issuing of the jury process, but also that it arose *within eight days* next before the pleading such plea, or unless the Court or judge shall otherwise order. Such rule must be strictly complied with; see *Dunn* v. *Hill*, 11 M. & W. 470. That rule, however, only applies when the recent event is to be pleaded as *matter of defence* or *in maintenance* of the action, and does not extend to mere *suggestions of deaths*, or other events which we are here to consider. If the *death* of one of several plaintiffs or defendants occur between the issuing of the writ and *before declaration*, such death should be stated in one of the forms given in the preceding volume, page 17. If *after* declaration, then as in one of the following forms. And although, according to Barnes, 469; 1 Burr. 363, the death might be suggested at *any time before judgment*, yet in *Rex* v. *Cohen*, 1 Stark. Rep. 511, cited and approved of in *Rice* v. *James*, 2 Dowl. 435, 436, where one of the plaintiffs died after issue joined, but before trial, and the death was not suggested in the nisi prius record, according to the above statute, Lord Ellenborough considered that the trial would be extrajudicial, and therefore it seems that the death should be suggested or stated at *the earliest opportunity;* and see 5 Term Rep. 477; *6 Bar. & Cres. 253*; Chitty's Arch. Prac. 7th edit. 1172.

Death of one of several plaintiffs or defendants between writ and declaration.

(*a*) *See Nurse* v. *Geeting*, 3 Dowl. 157, *Wigley* v. *Tomlins*, id. 7.

(*b*) See Chit. Col. Stat. tit. Abatement, p. 2.

II. FORMS OF SUGGESTIONS.

FORMS OF SUGGESTIONS.

Commencement of any plea stating the death of one of the plaintiffs between declaration and plea. (a)

In the Queen's Bench, [*or* " C. P." *or* " Exch. of Pleas."]

On the —— day of —— A. D. ——.

C. D. ats. A. B. } The said defendant, by Y. Z. his attorney, [*or* " in person,"] saith, that before this day, to wit, on the —— day of ——, A. D. ——, the said G. H., one of the said plaintiffs, died, and the said A. B. then survived him; which allegation the said A. B. doth not deny, but admits the same to be true. (*b*) And thereupon the defendant saith that [*here state the subject-matter of the plea, whether in abatement or bar, with a proper conclusion.*

The like, where one of several defendants died between declaration and plea. (c)

In the Queen's Bench, [*or* " C. P." *or* " Exch. of Pleas."]

On the —— day of ——, A. D. ——.

C. D. sued with L. M. ats. A. B. } And now at this day, to wit, on the —— day of ——, A. D. ——, comes the said C. D. one of the said defendants, against whom, together with L. M., the plaintiff hath declared in this action by O. P. his attorney, and gives the Court here to understand and be informed that after the said plaintiff so declared, and before this day, to wit, on the —— day of ——, A. D. ——, the said L. M. died, and the said C. D. then survived him; which allegation the said plaintiff doth not deny, but admits the same to be true. And thereupon the said C. D. saith that [*here state the subject-matter of the plea by the surviving defendant.*

Commencement of replication where one of several plaintiffs died between plea and replication.

In the Queen's Bench, [*or* " C. P." *or* " Exch of Pleas."]

On the —— day of ——, A. D. ——.

A. B. who sued with E. F. agt. C. D. } And the said plaintiff, the said A. B. saith that after the plaintiff declared in this suit, and of the pleading of the said plea in this suit, and before this day, to wit, on the —— day of ——, A. D. ——, the said E. F. who together with the said A. B. commenced and prosecuted this action, died, and the said A. B. then survived him; and thereupon the said cause of action in the said declaration mentioned then survived to the said A. B. according to the statute in that case made and provided. Which allegation the said C. D. doth not deny, but admits the same to be true;

(*a*) See other forms, T. Chitty's Forms, 5th edit.

(*b*) This is termed an entry of *rien dedire*, law French, signifying that the opponent saith nothing to the contrary. If the fact suggested be untrue, *semble* that the proper course would be to make affidavit of the fact and apply to have the statement set aside.

(*c*) See the form of a suggestion at nisi prius, *post*, 3.

and thereupon the said A. B. as to the said first plea of the said C. D. saith that &c. [*here state the subject-matter of the survivor's replication.* FORMS OF SUGGESTIONS.

In the Queen's Bench, [*or* " C. P." *or* " Exch. of Pleas."] The like, where *one of several defendants* died between plea and replication.

On the —— day of ——, A. D. ——.

A. B. agt. C. D. sued together with E. F. } And the plaintiff saith, that after the said C. D. and E. F. pleaded to the declaration in this suit, and before this day, to wit, on the —— day of ——, A. D. ——, the said E. F. died, and the said C. D. then survived him, and the causes of action in the said declaration mentioned then survived to the plaintiff against the said C. D. according to the statute in such case made and provided. And which allegations of the said plaintiff the said C. D. doth not deny; and thereupon the plaintiff, as to the said plea of the said C. D. first above pleaded, saith that [*here state the subject-matter of replication to the pleas of the surviving defendant.*

[*To the end of the award of the venire, and immediately before the jurata, introduce by leave of the judge on summons the following suggestion.*]

Suggestion in nisi prius record immediately after the jurata of the recent death of *one of several defendants*, pursuant to 8 & 9 W. 3, c. 11, s. 7. (*d*)

And now at this day, that is to say, on the —— day of ——, A. D. ——, [*the day of sittings after term, or of the commission day at the assizes,*] before Sir —— Knight, and Sir —— Knight, justices of our said Lady the Queen, appointed to take the assizes in and for the said county of Surrey, at Croydon, in the same county, come the said A. B. and the said C. D. by their respective attornies, but the said E. F. cometh not: And thereupon the said A. B., according to the statute in such case made and provided, *suggests* and gives the said justices here to understand and be informed, that after the awarding of the venire and issuing of the jury process in this suit, (*e*) and before this day, that is to say, on the —— day of ——, in the year of our Lord ——, aforesaid, the said E. F. died; and the said C. D. the other defendant, then survived him, and the said causes of action in the said declaration mentioned then survived against the said C. D. according to the statute in such case made and provided, and which the said C. D. doth not deny, but admits the same to be true: Therefore let the said issue [*or* " issues"] so joined as aforesaid, be tried between the said A. B. and the said C. D.

In the Queen's Bench, [*or* " C. P." *or* " Exch. of Pleas."] Commencement of rejoinder, stating a change of the defendant's attorney by a judge's order.

On the —— day of ——, A. D. ——.

C. D. ats. A. B. } And the said defendant, by Y. Z. his *now* attorney, and who since the plaintiff replied in this suit, and before this day, to wit, on the —— day of ——, A. D. ——, was, at the instance of the said defendant, by the order of the Honourable Sir ——, one of the justices of this Court, duly appointed attorney for the said defendant in this cause, in lieu and stead of the said E. F. who so was the attorney of the said defendant in this suit, comes and saith that [*here state the subject-matter of the rejoinder.*

(*d*) See the case as it occurred, in Chitty's 2d Stat. 2, note (*e*).

(*e*) See Reg. Gen. Hil. T. 4 W. 4, reg. 2, abolishing continuances, &c., Jervis's Rules, 4th edit. 115; *ante*, vol. i. Appendix.

FORMS OF SUGGESTIONS.

Where a defendant was *knighted* between declaration and plea.

In the Queen's Bench, [*or* " C. P." *or* " Exch. of Pleas."]

On the —— day of ——, A. D. ——.

Sir C. D. Knight, heretofore Gentleman, ats. A. B.

The said defendant by Y. Z. his attorney [*or* " in person"] saith, that before this day, to wit, on the —— day of ——, A. D. ——, he took upon himself the order of knighthood, and then became and was and from thenceforth hitherto hath been and still is Sir C. D. Knight, which allegation the plaintiff doth not deny: and thereupon the defendant saith that &c. [*here state the subject-matter of the plea.*

Commencement where the defendant became a *peer* between declaration and plea.

In the Queen's Bench, [*or* " C. P." *or* " Exch. of Pleas."]

On the —— day of ——, A. D. ——.

John Lord ——, sued as Sir C. D. ats. A. B.

The said defendant by —— his attorney [*or* " in person"] saith, that since the plaintiff declared against him in this action, and before this day, to wit, on the —— day of ——, A. D. ——, he became and was and still is a peer of this realm and of parliament, and then was and still is entitled to all the privileges of and belonging to that rank and degree, which allegation the plaintiff doth not deny: and thereupon the defendant saith that &c. [*here state the subject-matter of the plea.*

Commencement of a plea by a defendant's *correct name*, he having been misnamed in the writ and declaration. (*f*)

In the Queen's Bench, [*or* " C. P." *or* Exch. of Pleas."]

On the —— day of ——, A. D. ——.

C. D. sued by the name of E. D. ats. A. B.

And C. D., (*g*) against whom the said plaintiff hath issued in this suit a writ of summons by the name of E. D., by Y. Z. his attorney [*or* " in person"] says, that [*here state the subject-matter of the plea.* (*f*)

Form of pleading *new matter as a defence that has arisen since the commencement of the action*, and before the issuing of the jury process. (*h*)

In the Queen's Bench, [*or* " C. P." *or* " Exch. of Pleas."]

On the —— day of ——, A. D. ——.

C. D. ats. A. B.

And now at this day comes the said defendant by his attorney aforesaid, and saith that the said plaintiff ought not *further* to maintain his action against the said defendant, because he saith that

(*f*) Wherever a defendant pleads in a *different* name to that in which he is sued, whether in abatement (5 Term Rep. 487) or in bar (3 Wils. 413; 3 Wentw. 210), the plea should begin as above, and not " and the *said* C. D." *or* " he against whom, &c.;" because it is said that by introducing the word " *said*" he would admit himself to be the person sued. Willes, 41, note (*e*); 2 Saund. 209 b; 5 Taunt. 652, 653. A mistake in stating the defendant's christian name in the commencement of a plea does not entitle the plaintiff to sign judgment as for want of a plea, 7 Dowl. & Ryl. 511.

(*g*) The stat. 3 & 4 W. 4, c. 42, s. 11, enacts, that no plea in *abatement* for *misnomer* shall be allowed in any *personal* action; but if the misnomer be continued in the declaration the defendant may, upon a judge's summons, founded on an affidavit of the right name, compel the plaintiff at his costs to state the name correctly in his declaration. Before that enactment, and still, the defendant may, instead of such proceeding, always plead in his right name, so as to prevent any admissions on the record that his name is that stated by the plaintiff.

(*h*) See form of plea at nisi prius, *post*. Reg. Gen. Hil. T. 4 W. 4, reg. 2, provides " that in all cases in which a plea *puis darrein continuance* is now by law pleadable in banc or at nisi prius, the same defence may be pleaded with an allegation that the matter arose after the *last* pleading, or the issuing of the jury process, as the case may be: provided also, that no such plea shall be allowed unless accompanied with an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the Court or a judge shall otherwise order."

after the pleading of the last pleading in this suit, that is to say, after the said —— day of ——, A. D. ——, on which day the said plaintiff [*or* "defendant"] pleaded his said plea [*or* "replication" *or* "rejoinder"], and before this day, and within eight days now last past, (*i*) to wit, on the —— day of ——, A. D. ——, [*here state the subject-matter of the plea.*] And this the said defendant is ready to verify, wherefore he prays judgment if the plaintiff ought *further* to maintain his action thereof against him, &c. (*k*)

John Hulme.

Affidavit of truth thereof. (*l*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

Between { A. B. plaintiff, and C. D. defendant.

C. D. of ——, [tailor] the defendant in this action, maketh oath and saith that the *plea* hereunto annexed is true in substance and fact, and that the matter thereof arose *within eight days next before this day, being the —— day of ——, A. D. ——, on which the said plea was pleaded.* (*l*)

Sworn, &c. C. D.

(*i*) The plea should show that the defence arose after the last pleading, and within eight days before pleading it, or that further time was allowed by the Court or a judge; *Dunn v. Hill*, 11 M. & W. 470.

(*k*) If the subject-matter of the plea be to abate the suit, as where a feme sole commenced the action and declared and married, then the plea must conclude in *abatement* of the writ, and that the same may be quashed, see Pleas in Abatement, *post*.

(*l*) See the Reg. Gen. Hil. T. 4 W. 4, reg. 2, requiring this affidavit. *Semble*, that in a country cause it might be impossible for a defendant to swear, with propriety, to the words in italic, and that in such a case, the affidavit, instead of the words in italic, might be, "on the —— day of —— now last past, and not before;" or, if the leave of a judge be obtained to plead after the eight days, then the affidavit should add to the last allegation, "and this defendant further saith, that the Honourable Mr. Justice ——— hath duly ordered that the defendant should have leave to plead this plea until the —— day of —— instant." See further as to this plea and the form of the affidavit, &c. Chitty's Arch. 7th edit. 299 to 302.

III. COMMENCEMENTS OF PLEAS.

COMMENCEMENTS OF PLEAS.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]
On the —— day of ——, A. D. ——. (*a*)

Statement of appearance *by attorney.*

D. ats. B. } The said defendant by Y. Z., his attorney, (*b*) says that, &c, (*c*) [*Here state the subject-matter of the plea, whether in abatement or bar.*

The like *by husband and wife.*

D. and wife, ats. B. } The defendants, by G. H., their attorney, (*d*) say that, &c.

The like on appearance *in person* by a *feme covert.*

D. ats. B. } The defendant in person (*e*) says that, &c.

Statement of appearance and defence by a person *sued by a wrong name.*

C. D. sued by the name of E. D. ats. B. } And C. D., (*f*) against whom the said plaintiff hath issued the writ of summons in this suit by the name of E. D., in person, [*or* "by ——, his attorney,"] says, &c.

Statement of a separate appearance and plea *by one of several defendants* sued jointly.

D. sued with F. and others, ats. B. } And C. D. who hath been sued in this action together with E. F. and G. H., by Y. Z., his attorney, says that, [*here state the subject-matter of this particular defendant's plea.*

(*a*) The day when pleaded, Reg. Gen. Hil. T. 4 W. 4, reg. 1, *ante*, vol. i. 576. Where a plea is delivered bearing date on a former day, contrary to the rule, it is an irregularity, but not a nullity; *Hodson* v. *Pennell*, 4 M. & W. 373.

(*b*) As the form in Reg. Gen. Hil. T. 4 W. 4, reg. 10, requires the plea to state whether the defendant pleads by attorney or in person, the plea should show which.

(*c*) As to the statement of the appearance and *defence*, in general, see *ante*, vol. i. 576 to 582. The "&c." implied *half* defence, in cases where such defence should be made, or full defence where the latter was necessary. The distinction between *half* and *full* defence has become nearly obsolete; 8 T. R. 633; Willes, 40; 2 Saund. 209 c. According to the old books *half* defence, when fully stated, was as follows: "*And the said C. D. by —— his attorney*, [or '*in his own proper person*,'] *comes and defends the wrong and injury, and says, that,*" [omitting the words "*when, &c.*"] and *full* defence was as follows: "*And the said C. D. by —— his attorney, comes and defends the wrong and injury, when and where it shall behove him, and the damages, and all which he ought to defend, because he says, &c.*" 2 Saund. 209 c. The Reg. Gen. Hil. T. 4 W. 4, reg. 10, orders that *no formal defence shall be required* in a plea, and it *shall* commence as follows: "*The* said *defendant, by —— his attorney*, [or '*in person, &c.*'] *says that.*" Other forms, as that in reg. 17, omits "*said*" defendant, and the word "*said*" is clearly not an essential part of the form.

(*d*) 2 Saund. 213.

(*e*) Defence by a feme covert must not be by attorney; 2 Saund. 209 c.

(*f*) Whenever the defendent pleads in a different name to that in which he is sued, whether in abatement, (5 T. R. 487,) or in bar, (3 Wils. 413; 3 Wentw. 210,) the plea should begin as above, and not with the words, "And the *said* C. D." or "he against whom, &c." because it is said, by introducing the word "*said*" he would admit himself to be the person sued; Willes, 41, note c, 2 Saund. 209 b; 5 Taunt. 652, 653.

Statement of appearance and plea *by an infant.* (*g*)

D. } The defendant, by G. H., admitted by the court here as *guardian*
ats. } of the said defendant to defend for the said defendant, who is an
B. } infant under the age of twenty-one years, says, &c.

(*g*) See form, **Morg. 221.** A person who is an *infant* at the time of pleading must plead by *guardian*; 2 Saund. 117 g, note 1, 212 a, note 4. If a minor appear by attorney, the Court will, at the plaintiff's instance, compel an amendment of the appearance, by substituting a guardian; 7 Taunt. 488; 1 J. B. Moore, 251, S. C. Infant *defendant*, on a judgment by default, may sustain a writ of error, if he appeared by attorney, but the plaintiff cannot bring error on a judgment given for an infant, see 5 B. & Ald. 418; and see further as to defences and appearances by infants, *ante*, vol. i. 443, Index, "*Infant.*" If an infant plaintiff declare by *attorney* the defendant may plead the objection in abatement, see *ante*, vol. i. 464.

IV. PLEAS TO THE JURISDICTION.

PLEAS TO JURISDICTION.

In the Court of ——.

The —— day of —— A.D. ——.

Pleas in an inferior Court that the causes of action arose out of its jurisdiction. (*a*)

C. D. ats. A. B. } And the defendant, in his own proper person comes (*b*) and says that this Court ought not to have or take further cognizance of this action, because he saith that the said supposed causes of action and each and every of them, [*if any such have accrued to the said plaintiff*, (*c*)] accrued to the plaintiff out of the jurisdiction of this Court, that is to say, at ——, in the county of ——, (*d*) and not at ——, in the county of ——, or elsewhere within the jurisdiction of this Court; and this the defendant is ready to verify, wherefore he prays judgment whether this Court can or will take further cognizance of the said action. [*There must be an affidavit of the truth, see 3 Wils.* 51, *which may be framed as post*, 11.

(*a*) See precedents of pleas to the jurisdiction and replications, 1 Wentw. 61, 60, 61, 69, 78; Lil. Ent. 475; 1 Wentw. Index; 1 Mall. 2. As to the points relating to these pleas, see *ante*, vol. i. 457 to 462; Bac. Abr. tit. Courts, D. 4; Com. Dig. Abatement (D.) See a plea to jurisdiction of K. B. that the lands are situate within the County Palatine of Durham, Stephen on Pleading, 5th edit. 51; and see a plea in bar to a declaration in assumpsit in K. B., the Court of Conscience Act for Westminster, 23 G. 2, c. 27, s. 27, 28, and see *Sandell* v. *Bennett*, 2 Adol. & Ellis, 204; 4 Nev. & Man. 89, where requisites of that plea considered; and it was held that the jurisdiction of *County Court* cannot be pleaded to the jurisdiction. See form of plea in the nature of a demurrer to the jurisdiction in an action in the County Court, that the sum sought to be recovered exceeded 40*s.*, *Dempster* v. *Purnell*, 3 M. & G. 375; and see plea to the jurisdiction in an action for calls by a railway company, that the defendant under the act of parliament was only liable to be sued in the Courts of Record of Dublin; *Dundalk Railway Company* v. *Tapster*, 1 G. & D. 658.

(*b*) "Defends the wrong and injury," not necessary; Bac. Abr. tit. Pleas, D.; Carth. 220; Salk. 217; "when, &c.," is improper. *Quære* whether a plea strictly to the jurisdiction of the court must be pleaded in person, and whether, if the plea be pleaded by attorney, the objection may be taken on demurrer, or only by application to the court; *Hunter* v. *Neck*, 3 M. & G. 181; 3 Scott, N. R. 448, S. C.

(*c*) These words will be found in most of the ancient forms, but as the plea in effect admits *some* contract or contracts, though properly enforceable *in a different court*, perhaps it would be better to omit those words; see *Gould* v. *Lashbury*, 1 Crom. M. & Ros. 254; 2 Dowl. 707, S. C.

(*d*) This is not necessary in a plea to the jurisdiction of an *inferior court*: it is sufficient to allege that the cause of action accrued out of its jurisdiction, without showing the jurisdiction to which the plaintiff should have resorted. But to take away the jurisdiction of either of the *superior* courts the plea must always show what other court in particular *has* full and competent jurisdiction over the matter, if the suit should be there instituted; 6 East, 600, 601; *ante*, vol. i. 461.

V. PLEAS IN ABATEMENT.

It was formerly considered important to observe *arrangement* in the order of pleas in abatement, not only on account of the varying forms of *commencements and conclusions* of each, but also as regarded the *succession* or *order of pleading* one of those pleas after another. Thus, supposing the defendant succeed, or even be defeated on one plea, he might, if in time for so doing, plead another plea in abatement, provided it were *subsequent* in order, though not one of the same class or in prior order, see Com. Dig. Abatement, C.; *ante*, vol. i. 463. The approved order of pleas in abatement was thus:

1. To the disability or privilege of the person.
  1. Of the plaintiff; as being alien enemy.
  2. Privilege of defendant; as of a peer, or an attorney, to be sued in another Court.

2. To the count or declaration.

3. To the writ, in abatement thereof, as,
  1. To the form of the writ.
    1. Matter apparent on the face of it.
    2. Matter dehors.
  2. To the action of the writ.

Nonjoinder regulated. (a)

By 3 & 4 W. 4, c. 42, s. 8, it was enacted that "no plea in abatement for the *non-joinder* of any person as a co-defendant shall be allowed in any Court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an *affidavit* verifying such plea. And by sect. 9 it was further enacted that, to any plea in abatement in any court of law of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors.

Misnomer pleas abolished.

Sect. 11. "That no plea in abatement for a *misnomer* shall be allowed in any personal action, but that in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the

(a) A plea of coverture of the defendant is not within this section; *Jones* v. *Smith*, 6 Dowl. P. C. 857.

PLEAS IN ABATEMENT.

cost of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the cost of such application shall be paid by the party applying, if the judge shall think fit."

Forms of pleas in abatement.

The following rules of Court seem to apply as well to the forms of pleas in abatement in personal actions and pleadings thereupon as to pleas in bar.

Title to be day when pleaded.

Reg. Gen. Hil. T. 4 W. 4, reg. 1, "*Every* pleading shall be *entitled* of the day of the month and year when the same was pleaded, and shall bear no other time or date."

No formal defence, but commencement to be thus.

Reg. 10 orders that, "no formal defence shall be *required* in a plea;" and it shall commence as follows:—"The said defendant, by —— his attorney [*or* "in person,"] says, that, &c." And this rule seems to apply as well to pleas in abatement as to pleas in bar. As the rule, however, in its terms, is not imperative, a formal defence would not be demurrable.

Pleas in abatement, as well as pleas to the jurisdiction, must be delivered within four days (Reg. Gen. H. T. 4 W. 4), to be computed exclusively of the first and inclusively of the last; *Ryland* v. *Wormald*, 2 M. & W. 393; 5 Dowl. 581.

Common form of a plea in abatement as respects the commencement and conclusion in general.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

The —— day of ——, A. D. ——.

C. D. ats. A. B. } The said defendant, by —— his attorney, [*or* "in person,"] says that, &c.

[*In general a plea in abatement runs thus:*—]

"And the said defendant, by —— his attorney, [*or* "in person,"] prays judgment of the said writ and declaration, (*b*) because he says that, [*here state the particular ground of abatement, showing the* time *when it arose, but as well before (see Neale* v. *De Garay*, 7 *Term Rep.* 243,) *as since the pleading rules, Hil. T.* 4, *W.* 4, *reg.* 8, venue *or place need not be stated, except in a plea of nonjoinder, when the exact place of residence of the omitted defendant must be stated in* an affidavit *verifying such plea according to* 3 & 4 *W.* 4, *c.* 42, *s.* 8.]

Conclusion.

And this the defendant is ready to verify, wherefore he prays judgment of the said writ and declaration, and that the same may be quashed, &c.

[*The signature of counsel is indispensable, and an affidavit of the truth is essential. The latter is required by stat.* 4 *Ann. c.* 16, *s.* 11, *and in the case of* nonjoinder, *since* 3 & 4 *W.* 4, *c.* 42, *s.* 8, *a different form of affidavit is requisite, see post,* 16.]

(*b*) Proceedings by bill are abolished by 2 W. 4, c. 39. According to the form in Plead. Assist. 452, the prayer may be of the *writ* only; or according to the form in Stephen on Pleading, 5th edit. 54, it may be of the *declaration* only.

Usual affidavit of truth. (c)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

Between { A. B. (d) plaintiff, and C. D. (d) defendant.

C. D. of ——, (e) gentleman, the defendant in this cause, maketh oath and saith that the plea hereunto annexed *is true in substance and fact.* (f)

DISABILITY TO SUE.

Plaintiff an alien enemy. (g)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

C. D. ats. A. B. } The defendant by ——, his attorney, [*or* "in person,"] says that the plaintiff ought not to be answered to his declaration aforesaid, because he says that the plaintiff before and at the time of the commencement of this action was and still is an alien born, that is to say, born at Paris, in the kingdom of France, and then was and still is an enemy of our lady the now queen, born of father and mother then adhering to the said enemy; (h) and that the said plaintiff entered into this kingdom without the safe conduct of our said lady the queen. (i) And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to be answered to his declaration aforesaid, &c.

John Hulme.

[Obtain counsel's signature and annex an affidavit of truth in the form supra. In 1 *Wentw.* 7, 42, *it is suggested that there should be an affidavit of the place where the plaintiff was born, or at least that he was born in the ter-*

(c) This is required in support of *every* plea in abatement by 4 & 5 Ann. c. 16, s. 11, and if there be no affidavit, or one insufficient, plaintiff may sign judgment as for want of a plea.

(d) The *title* of the affidavit must be very correct, and a transposition of the names, even of a part of a christian name, would be fatal, as transposing Mary Ann in title of affidavit for Ann Mary; *Poole* v. *Pembrey*, 3 Tyr. 387; 1 Dowl. 693; or Thomas James for James Thomas; *Price* v. *James*, 2 Dowl. 435. An affidavit entitled "Between S. F., administratrix, &c., plaintiff, and W. L., defendant," is bad, for not specifying the name of the person of whom the plaintiff is administratrix; and where an affidavit in verification of a plea in abatement was so entitled, the Court set aside the plea, and only granted leave to the defendant to plead afresh upon terms of his pleading issuably; *Fletcher* v. *Lechmere*, 2 Dowl. N. S. 848.

(e) A very correct addition of abode and degree are essential in every affidavit, especially so when to be annexed to a plea in abatement; and the merely stating that the defendant is the above named defendant in this cause will not suffice; *Lawson's case*, 1 Cam. & M. 481; but see *Poole* v. *Pembrey*, 1 Dowl. 693.

(f) All these words are essential, and if the affidavit merely state that the plea hereunto annexed *is true*, it will not suffice; *Ondee* v. *Booth*, Stra. 705; and if instead of "the plea hereunto annexed, the word "affidavit" is used, this will be fatal; *Garrett* v. *Hooper*, 1 Dowl. 28.

(g) If the plaintiff were an alien enemy at the time the contract sued on was made, and it was thereby illegal to contract with him, then in general alien enemy may be pleaded in *bar*, as *post*. But when alienage only *suspends* the right to sue during the war, the objection must be pleaded in *abatement;* 15 East, 260; 3 Campb. 152; and see forms Lil. Ent. 1; Mod. Ent. 9; 1 Wentw. 7, 42, 51; Aston's Ent. 11; Stephen's Pleading, 5th edit. 54; see 4 East, 522. An Englishman, whilst residing in an enemy's country and adhering to the enemy, cannot sue; 3 Bos. & Pul. 164; Cobbett's Stat. Trial, 588.

(h) Some precedents here aver "and was not nor is a subject of our lady the queen by naturalization, denization, or otherwise;" see form, Chitty on Pleading, 5th edit. 911; and 8 Term Rep. 166; and when the fact, it may be advisable to insert those words.

(i) If the plaintiff be resident out of the kingdom, omit these words, and substitute, "and the defendant further saith, that at the time of the commencement of this suit, the persons exercising the powers of government in France aforesaid were and still are at war with and enemies of our said lady the queen, and that the plaintiff, so being such alien born, and such enemy as aforesaid, before and at the time of the commencement of this suit, was and still is resident and living out of this kingdom, and within France aforesaid, and adhering to the said enemies of our said lady the queen, and this, &c."

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ritory then belonging to the enemy, and that he was not naturalized, to defendant's knowledge; but no authority is referred to in support of that position.]

Plea that *plaintiff* has been *convicted of felony* and sentenced to transportation for a term unexpired.

See a form of plea and replication of plaintiff's conviction of a felony and sentence of transportation for a time unexpired, 1 Wentw. 75; and see numerous other pleas referred to, id. Index.

PRIVILEGE OF ATTORNEY.

Plea of privilege by an attorney of C. P. to an action in Q. B. that defendant ought only to be sued in his own Court. (*j*)

In the Queen's Bench.

On the —— day of ——, A. D. ——.

C. D. Gent. one, &c. ats. A. B.

And the said defendant, by ——, his attorney, (*k*) says that before and at the time (*l*) of the commencement of this suit, he was, and from thence hitherto hath been and still is, one of the attornies of the Court of our lady the queen of the bench at Westminster, in the county of Middlesex, and hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the same Court of the Bench for divers liege subjects of our said lady the queen, as their attorney. (*m*) And that he and all other the attornies of the said Court of the Bench, (prosecuting and defending suits and pleas for their clients in that Court, (*n*)) ought, (*o*) by an ancient and laudable custom from time immemorial used and approved of, according to the laws and customs of this realm and the liberties and privileges of the said Court of the Bench, to be free and exempt from being compelled against their will, and have not, nor hath any or either of them, at any time or times whatsoever, hitherto been used or accustomed to be compelled to answer any plea or plaint in any action personal, pleas of freehold, felony, and

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(*j*) As to pleas in abatement in general, vol. i. 462 to 486. See precedents, 2 Rich. C. P. 9; Lil. Ent. 3, 9; 1 Wentw. Index, iv., xviii.; 8 T. R. 631; 1 Mod. Ent. 2, 11; Lutw. 639, 1666; and a plea of privilege by a serjeant, Plead. Assist. 306. This is a plea of privilege, and not a plea to the jurisdiction; *Hunter* v. *Neck*, 3 M. & G. 188; 3 Scott, N. R. 448, S. C., where see form of plea. Sometimes the precedents used to commence by "defending the wrong and injury, *when, &c.*, and that the Court ought not to take cognizance," and this sufficed, see 8 T. R. 631; but it was more correct to omit the "*when, &c.*," and only to *conclude* the plea by praying judgment, if the Court would take further cognizance of the suit; see 3 T. R. 186; Gilb. C. P. 209; Lutw. 639; Latch, 178. When an attorney or other officer of the Court was sued out of his *own* Court, his plea of privilege was to be considered as a plea to the jurisdiction; but when he was sued in *his proper Court*, though by improper process, as by latitat, or original writ in the Queen's Bench, the plea was then to be considered as in abatement of the writ, and might conclude accordingly, as in the plea in *Comerford* v. *Price*, Dougl. 312, which was held good on demurrer. There are precedents, however, which in both cases conclude "whether the defendant ought to be compelled to answer;" 1 Wentw. 39, 40, 53, 64; 2 Saund. 209 d, e, in notes; and see 12 East, 544. Since the Uniformity of Process Act, 2 W. 4, c. 39, an attorney may be sued as a common person by writ of *summons*, but still he may plead *in abatement if he be sued out of his own Court*; for that statute has only given a new form of process in lieu of the proceedings by bill; *Lewis* v. *Kerr*, 5 Dowl. 447; 2 M. & W. 226, S. C. Nor is the privilege taken away by 6 & 7 Vict. c. 73, s. 27 (re-enacting 1 & 2 Vict. c. 45, s. 3), whereby an attorney of any one of the Courts of Westminster is rendered competent to practise in any of the others on signing the roll; *Percival* v. *Cooke*, 7 Dowl. 500; 5 M. & W. 293, S. C.; *Price* v. *Smith*, 6 Dowl. 299.

(*k*) See *Hunter* v. *Neck*, 3 M. & Gr. 181. If the defendant is not an attorney of the Court in which he is sued, the plea must be by attorney; *Groom* v. *Wortham*, 2 Dowl. N. R. 657.

(*l*) That this is a necessary averment, see 1 Salk. 1; 2 Stra. 864; 2 Ld. Raym. 1567.

(*m*) This allegation is unnecessary, Lutw. 1666; Com. Dig. Abatement, D. 6. And see *Spike* v. *Adams*, K. B. 10th June, 1831: it was decided by Mr. Justice Patteson, on demurrer to a replication to a plea of privilege, which replication stated that defendant *had not practised within a year*, that such replication was insufficient.

(*n*) This allegation, though usual, is not necessary, see note (*m*), *supra*.

(*o*) It is more correct thus than in the negative, 2 Ld. Raym. 869, 898, 899; but as the Courts will take notice of the custom, *id. ibid.* it would therefore seem that a mistake is not material, 9 East, 424, 339.

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appeals only excepted, before any justice or minister of our said lady the queen, or other judge whomsoever in any Court whatsoever, except before the justices of our said lady the queen of the Court of the Bench at Westminster aforesaid, (*p*) ["and the defendant further saith that at the time of the commencement of this action he was not nor hath he ever been an attorney, officer, or minister of the said Court of Q. B.," (*q*)] and this the defendant is ready to verify, wherefore he prays judgment if the said Court of our said lady the queen, before the queen herself now here, will or ought to take cognizance of the said plea. (*r*) [*Counsel's signature is to be subscribed and the following affidavit* (*s*) *annexed.*

Affidavit of the truth thereof. (*t*)

In the Queen's Bench.

Between { A. B. . . . . plaintiff, and C. D. (*u*) Gentleman, one, &c. defendant.

C. D. of ——, Gentleman, one of the attornies of the Court of Common Pleas at Westminster, in the county of Middlesex, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and fact.

Sworn, [&c.] C. D.

[*When an attorney of Q. B. is improperly sued in C. P. or Exchequer of Pleas, his plea of privilege to be sued in his own Court will be the same as the above, except in the name of the Court.*]

Privilege of the Court of Chancery.

[See the form in *Wilkes* v. *Williams*, 8 Term Rep. 631, 731, of a plea in abatement to the jurisdiction of the Court, of the privilege of a *tipstaff or other officers* of the Court of Chancery to be sued there only, except in certain cases.]

Observations on pleas of privilege of a Peer.

[As the 2 W. 4, c. 39, abolished the necessity for suing a peer by *original writ*, and authorises a common *writ of summons*, it would seem that a plea of privilege as *a Peer*, whether of England, Scotland, or Ireland, cannot any longer be pleaded in abatement to an action commenced by writ of summons in the Q. B., C. P. or Exchequer. Such a plea would be in effect a plea of *misnomer*, which is now abolished by 3 & 4 W. 4, c. 42, sec. 11. See *Digby* v. *Alexander*, 8 Bingh. 427; *Cantwell* v. *Earl Stirling*, id. 174, where see a form of plea. If a peer *were arrested*, his remedy was by summary appli-

(*p*) The plea may be pleaded with a profert of the writ of privilege, and then it cannot be denied that he is an attorney, 2 Salk. 545; Skin. 582; Com. Dig. Abatement, D. 6.

(*q*) This is not necessary, and the averment that the defendant *is* an attorney of Q. B., or other Court in which he is sued, is a matter of fact, which ought to come by way of replication from the other side; *Percival* v. *Cooke*, 7 Dowl. 600; 5 M. & W. 293, S. C.

(*r*) This conclusion is proper, where the defendant is sued *out of his own Court*, 12 East, 544, 545; as to the conclusions of pleas in abatement in general, see Tidd's Prac. 9th ed. 638; *ante*, vol. i. 476; and see 1 Wentw. 41.

(*s*) See a general form of affidavit, 1 Lil. Ent. 1. It was considered doubtful whether a plea of privilege by an attorney need be verified by affidavit; 2 B. & P. 397; Prac. Reg. 5; Lil. Ent. 6, cites Salk. 1, 2, 3. But in *Davidson* v. *Chilman*, 1 Bingh. N. C. 297; 5 Moore & Scott, 117; 3 Dowl. 129, S. C., it was held that such affidavit is essential, or plaintiff may sign judgment. The Court take notice who are attornies of their *own* Court, but not of an attorney of *another* Court.

(*t*) *Vide* the note, *ante*, 11, note (*c*).

(*u*) This is the usual form of affidavit. As to the certainty required, see *ante*, vol. i. 479; Kenyon's Rep. 364; Say. 293. An affidavit that "the plea is true," omitting "*in substance and fact*," will not suffice; Stra. 705; *ante*, vol. i. 479.

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cation; *Digby* v. *Lord Stirling*, 8 Bingh. 55. But if a peer be sued by pone pervadios, or other process in any other Court, as in the Common Pleas at Durham, it may be otherwise. In *Losh* v. *Londonderry* such a plea was pleaded with effect in January, A. D. 1836, for Mr. Gregson, Solicitor, Great James Street, Bedford Row.]

COVERTURE.

Coverture of the Plaintiff. (*x*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

(*y*) On the —— day of ——, A. D. ——.

C. D. ats. A. B. } And the defendant, by Y. Z. his attorney, [*or* "in person,"] prays judgment of the said writ and declaration, because he says that the plaintiff, before and at the time of the commencement of this suit, (*z*) was and still is married to one E. F. then and yet her husband, and who is still living; and this the defendant is ready to verify, wherefore because the said E. F. is not named in the said writ and declaration as co-plaintiff, the defendant prays judgment of the same, and that they may be quashed, (*a*) &c. [*Obtain counsel's signature, annex affidavit of the truth as ante*, 11.

Coverture of the *Defendant*. (*b*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

(*c*) On the —— day of ——, A. D. ——.

C. F. sued by the name of C. D. ats. A. B. } And the defendant, to wit, C. F. sued by the name of C. D. in person, (*d*) prays judgment of the said writ and declaration, because she says, that at the time of the commencement of this suit she was and still is married to one E. F. who is still living; and this she is ready to verify; wherefore and because the said E. F. is not named in the said writ and declaration as co-defendant, she prays judgment of the said writ and declaration (*e*) and that the same may be quashed, &c. (*f*) [*Obtain signature of counsel and affidavit of the truth, as ante*, 11.

NON-JOINDER OF A CO-PLAINTIFF.

Plea that there was another *co-*

[Although the non-joinder of a person who ought to be a *co-plaintiff* in an action in form ex contractu is ground of *nonsuit*, yet the objection *may* be pleaded in *abatement*; see Com. Dig. Abatement, E. 12, 15; and see form,

(*x*) See the precedents, 1 Went. 47; *id.* index, ix.; Lil. Ent. 123. As to when a good plea in abatement or bar, see *Bendix* v. *Wakeman*, 1 Dowl. & Lowndes, 450. If a plaintiff in replevin takes husband after plaint and before the removal of it by *re. fa. lo.*, the defendant may plead the fact in abatement, though he himself sued out the *re. fa. lo.*; *Hollis* v. *Freer*, 2 Bing. N. C. 719.

(*y*) See the precedents, Ast. Ent. 9; 3 Inst. Cl. 70; *id. puis darrein continuance*; Thomp. Ent. 1.

(*z*) See Bac. Ab. Abatement, G.

(*a*) See note (*p*), *post*, 16. Although in effect this plea is in abatement for non-joinder of the husband, yet it does not appear to have been considered to have been affected by 3 & 4 W. 4, c. 42, sect. 8, as requiring an affidavit of the residence within the jurisdiction, and place of residence; but the affidavit of truth, as required by 4 Ann. c. 16, is still essential to this and all pleas in abatement; see note (*c*), *infra*.

(*b*) See forms, 6 M. & S. 220; 2 Rich. C. P. 1; Lil. Ent. 1. As to coverture of defendant after the writ, Bac. Ab. Abatement, G. Coverture can only be pleaded in *bar*, when the defendant was married at the time when the supposed contract was made. In other cases it must be pleaded in *abatement*; see 3 T. R. 631. See a form, *post*, 23, of a plea *in bar* of coverture as to part, and in *abatement* as to residue. This plea is not within the 8th section of the 3 & 4 W. 4, c. 42, which requires pleas in abatement for nonjoinder to state that the person not joined is resident within the jurisdiction of the Court, &c., *Jones* v. *Smith*, 6 Dowl. 557; but it is a dilatory plea requiring an affidavit of verification under the 4 Ann. c. 16, s. 11, in the absence of which the plaintiff is entitled to sign judgment; *Lovell* v. *Walker*, 9 M. & W. 299.

(*c*) The plea must now be intituled of the day it is pleaded.

(*d*) In Lutw. 23, the defendant's coverture was pleaded by attorney, but this is incorrect; see 2 Saund. 209 c; Lil. Ent. 1; 2 Rich. C. P. 1.

(*e*) See *post*, 16, note (*p*).

(*f*) The conclusion in 1 Lutw. 23, is different.

Herne, 9. According to *Davies* v. *Evans*, 6 Car. & P. 619, if to such a plea the replication be that the promise was made to the plaintiff alone, and not to the plaintiff and the third person, upon which the issue has been joined, the plaintiff is upon the trial to begin; and the third person is a competent witness for the defendant, to prove that the contract was made to him and the plaintiff, in support of the plea.]

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contractor who ought to have been *co-plaintiff*.

Plea in abatement in *trespass non-joinder* of two persons who ought to be *joint-plaintiffs*. (*g*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

C. D. ats. A. B. } And the said defendant, by —— his attorney, [*or* "in person,"] prays judgment of the said writ and declaration, because he saith that the plaintiff neither at the said times when, &c. nor either of them, nor ever since had nor hath any thing in the said close in which, &c. nor in the said trees or underwood in the said declaration mentioned, nor in any of them, nor in any part thereof, but jointly and undividedly with G. H. and I. K. who are both still living; and this the said defendant is ready to verify; wherefore inasmuch as the said G. H. and I. K. are not named in the said writ and declaration, he prays judgment of the said writ and declaration, and that the same may be quashed, &c. [*Obtain counsel's signature, and annex affidavit of truth of plea, as ante*, 11.

NON-JOINDER OF A DEFENDANT.

Plea in assumpsit, that the contracts were made jointly with another person not joined as a defendant. (*k*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

C. D. ats. A. B. } And the defendant by E. F. his attorney (*h*) [*or* "in person"] prays judgment (*i*) of the said writ and declaration, (*i*) because he says that the said alleged* (*j*) promise [*or* "promises"] in the said

(*g*) See form of plea and replication in 1 Wentw. 67—78; 1 Bro. 8; Hans. 103; Rast. Ent. 653; 6 Term Rep. 766; Com. Dig. Abatement, E. 8, 9, 10. This objection in an action for a *tort* can only be pleaded in *abatement*; and this rule extends to actions of detinue, *Broadbent* v. *Ledward*, 11 A. & E. 209; 3 P. & D. 45, S. C.; 1 Saund. 291 e, 291 k, note (*i*); 2 Saund. 117; and see fully observations of Parke, B. *Stancliffe* v. *Hardwicke*, 1 Gale, 128. *Semble*, that it would be better to plead *affirmatively* that the omitted parties were jointly possessed of and interested in the close, trees, &c. than as above. In an action on the case against a bailee of goods delivered to him for reward by the plaintiff, containing some counts charging a misuser of the goods, whereby they were lost to the plaintiff, and other counts in trover, the defendant cannot plead generally in abatement that they were the goods of the plaintiffs and other persons; and a plea in abatement for the non-joinder of parties, pleaded to several counts, if bad as to any of them, is bad altogether; and there must be a general judgment of *respondeat ouster*, although it would have been good if pleaded separately to the other counts; *Phillips* v. *Claggett*, 10 M. & W. 103.

(*h*) May be by attorney, Lutw. 696.

(*i*) In Moore, 30, and 1 Lutwich, 11, it is said that a plea in abatement on account of matters *dehors* should not *commence* with a prayer of judgment, but only conclude with it; but any such distinction does not seem to have been attended to in Lil. Ent. 6; Thomp. Ent. 1; 2 Saund. 209; and when the plea in abatement for non-joinder is to the *whole* of the action, it is not necessary to plead in abatement both of the declaration and writ, but it is sufficient to plead to the writ only; but where it is intended to plead in abatement only of *part* of the writ, and the cause of abatement arises from *some* of the *counts* in the *declaration*, defendant must plead in abatement *of both*; 2 Saund. 210, n. (*c*), and the precedent, 2 B. & P. 240. See also 2 M. & Sel. 484, n. (*a*), and *post*.

(*j*) The precedents have usually here introduced the word "*supposed*," and "*if any such were made*;" see *supra*, n. (*g*), and Stephen, 5th ed. 54; and in *Gould* v. *Lashbury* 1 Crom. M. & Ros. 254; 2 Dowl. 707, it seems to have been admitted that this was so in *such* pleas, but the Court held the words improper in other cases, as not confessing and avoiding; *id. ibid.*; *sed quære*. Anciently the *omission* of a party who ought to have been co-plaintiff or co-defendant, was considered a *variance* and ground of nonsuit, on a plea denying the contract as alleged, as showing a *different* contract, and it is still so as to *plaintiffs*. Perhaps then a plea of non-joinder does not *confess* the contract as *alleged*, and therefore the words, "if any such were made," may be proper in such a plea.

(*k*) See the older precedents, 1 Went. Index, and vol. i. 8, 32, 392; and see Lil.

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declaration mentioned, (*l*) was [*or* "were"] made by him the said E. F. defendant, jointly with one G. H. (*m*) who is still living, (*n*) and who before and at the time of the commencement of this suit was and still is resident within the jurisdiction of this Court [*to wit, at* ——, *in the county of* ——] (*o*) and not by the defendant alone; and this the defendant is ready to verify, wherefore inasmuch as the said E. H. is not named in the said writ and declaration together with the defendant, he the defendant prays judgment of the said writ and declaration, (*p*) and that the same may be quashed, &c. [*Obtain signature of counsel and an affidavit of truth, as follows:*—

Affidavit in support of plea as required by 3 & 4 W. 4, c. 42, s. 8.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

Between { A. B. plaintiff, and C. D. defendant.

C. D. of ——, in the county of ——, tailor, the above-named defendant in this cause, maketh oath and saith that the plea hereunto annexed is true in substance and in fact, and that the said E. F. therein named, at the time of the commencement of this suit, resided, and doth still reside (*q*) [*or*, "and that the place of residence of the said E. F. is now at this time"] at No. —, in —— street, in the parish of ——, in the county of ——, and within the jurisdiction of this Court.

[*Signature of deponent.*]

Sworn, &c.

Ent. 12; 3 Chitty on Pleading, 5th ed. 899, note (*a*). In covenant against a defendant, as assignee of a lease, a plea by him in abatement, that the estate, &c. vested in him jointly with another person, was holden bad, for not setting out the title specially; *Heap* v. *Livingston*, 1 Dowl. & Lowndes Rep. 334.

In proceedings on *scire facias* under 7 Geo. 4, c. 46, relating to banking companies, the non-joinder of other parties cannot be pleaded in abatement; *Fowler* v. *Rickerby*, 2 M. & G. 760. It seems that a plea in abatement in *assumpsit*, that the alleged promises were made by the defendants and one C., and not by the defendants only, contains a sufficient confession of the promises in the declaration to entitle the plaintiff to judgment after a verdict negativing the plea; *France* v. *White*, 1 M. & G. 731. The Court will not set aside the plea or allow the writ to be amended on the ground that the plaintiff is barred by the Statute of Limitations from bringing a fresh action; *Roberts* v. *Bate*, 6 A. & E. 778.

(*l*) In *Gould* v. *Lashbury*, 1 Crom. M. & Ros. 254; 2 Dowl. 707, S. C. it was admitted that the words "*if any such were made*," are usually here introduced in a plea in abatement for non-joinder. But as no inconvenience can result, it may be safer to omit those words.

(*m*) The plea must accurately disclose the names of *all* the contracting parties, so as to give a better writ; and if a party be omitted, or *too many* be stated, the plaintiff may take issue on the plea, and will succeed on the trial; 2 Bla. Rep. 951; 2 Marsh. 302; 6 Taunt. 587; S. C. Kenyon's Rep. 364; *Hill* v. *White*, 6 Bing. N. C. 23. But the plaintiff will be entitled to a verdict if he prove a right of action against the defendant alone for any portion of his claim; *Hill* v. *White*, 6 Bing. N. C. 26.

(*n*) A plea in abatement of non-joinder of a person who should be a defendant, must aver that the party omitted is still living; 1 Saund. 291 a, n. 2, b, n. 4.

(*o*) The real place of abode. But the latter words in italic may be omitted in the *plea*. At common law no venue or place was requisite in this plea; 2 Hen. Bla. 161; 7 T. R. 243; 8 T. R. 248; 1 Saund. 8 b. And now although 3 & 4 Will. 4, c. 42, s. 8, requires the *plea* to aver that the omitted defendant is *resident within the jurisdiction*, yet it only requires the *affidavit* to state the place of such residence.

(*p*) In proceedings by bill, praying judgment of the "*writ* and declaration" was bad; 2 M. & S. 484; 1 B. & Ald. 172. As to conclusions of pleas in abatement, see *ante*, vol. i. 478; Tidd's Prac. 9th edit. 638. As to the introduction or omission of the word "declaration," see 2 Saund. 209 d; Tidd's Prac. 9th edit. 638,

(*q*) *Semble*, that the affidavit must state the actual residence of the party at the time the affidavit is made; *Wheatley* v. *Golney*, 9 Dowl. 1019.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

C. D. and another, ats. A. B. and another. } And the said defendants, by ——, their attorney, crave oyer of the said supposed writing obligatory, and it is read to them in these words, to wit, [*here set out the obligatory part of the bond.*] They also crave oyer of the condition of the said supposed writing obligatory, and it is read to them in these words, Whereas, &c. [*here set out the condition of the bond with names of witnesses and signatures verbatim,*] which being read and heard, the said defendants pray judgment of the writ and declaration aforesaid, because they say that at the said time of the sealing and delivery of the said alleged writing obligatory, to wit, on the day and year aforesaid, the said E. F., in the writing obligatory aforesaid named, did likewise seal and deliver the writing obligatory aforesaid, as the act and deed of the said E. F. to the plaintiffs, and thereby then became firmly bound to the plaintiffs *jointly* with the defendants by the same writing obligatory, in the said sum of [£100] which said E. F. is still living, and who at the time of the commencement of this suit was and still is resident within the jurisdiction of this Court, to wit, at ——, in the county of ——, (*t*) and this the defendants are ready to verify; wherefore, inasmuch as the said E. F. is not named defendant together with the said defendants in the said writ and declaration, the defendants pray *judgment* of the said writ and declaration, and that the same may be quashed, &c. [*Add affidavit as ante*, 16.]

Non-joinder of a co-obligor in a joint and several bond. (*s*)

[*The same as the form in* 15 *to the asterisk, and then as follows:*] that the said several alleged debts in the declaration mentioned were and each of them was contracted by and became due from the defendant jointly with E. F. who is still living, and that neither of the same debts was contracted by, nor did either of them become due from, the defendant alone, and that the said supposed causes of action in the declaration mentioned and each of them accrued against the defendant jointly with the said E. F., and that the said E. F. before and at the time of the commencement of this action resided and still doth reside within the jurisdiction of this Court, &c. [*the same as above to the end.*]

The like plea of non-joinder to *debt* on simple contract.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

D. ats. B. } And the defendant, by Y. Z. his attorney, [*or* "in person,"] prays oyer of the said letters testamentary in the said declaration mentioned, and they are read to him in these words, [*here set them*

Plea that there is another executor who ought to be *co-plaintiff*. (*u*)

(*s*) See 1 Saund. 291 a, n. 2 b, as to the form. See also forms, Lil. Ent. 2; 2 Rich. Prac. K. B. 17; Ast. Ent. 7; Lutw. 696. See a form in Covenant, Lil. Ent. 7; and 2 Rich. Prac. K. B. 18. That defendant must plead in abatement, if he wish to take advantage of the non-joinder, see *ante*, vol. i. 53.

(*t*) See note (*o*), *ante*, 16. Plea that the contract was made to plaintiff and a third person not joined as a plaintiff and evidence; 6 Car. & P. 619.

(*u*) See another form, 1 Wentw. 13; and see 5 Burr. 2613; Lord Raym. 63; Com. Dig. Abatement, 813. In the form in 1 Went. 13, it is alleged that the omitted executor had *actually administered*, but *semble*, that averment is not necessary when an executor, who ought to be a *co-plaintiff*, has been omitted; see 1 Saund. 291 k, in note. As to craving oyer of probate, see 1 Saund. 291 i, in note.

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forth verbatim, they disclosing that another person was named executor,] which being read and heard, the defendant prays judgment of the said writ and declaration, because he saith that the said L. M. who was and is by the said last will and testament named and appointed executor as aforesaid, before and at the time of the commencement of this action was and still is living, and this the defendant is ready to verify; wherefore because the said L. M. hath not been nor is joined in the said writ and declaration, the defendant prays judgment of the said writ and declaration, and that the same may be quashed, &c. [*Add counsel's signature and affidavit of truth, as ante,* 11, *and post,* 20.

Non-joinder of a *co-executor* as *defendant.* (*x*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of —— A. D. ——.

D. ats. B. } And the defendant by Y. Z., his attorney, [*or* "in person,"] prays judgment of the said writ and declaration, because he says that the said G. H. the said testator, heretofore, to wit, on &c. made his last will and testament, and thereby constituted and appointed the defendant and one L. M. executors thereof. And afterwards, to wit, on the same day the said G. H. died, and the defendant and the said L. M. afterwards, to wit, on the —— day of ——, A. D. ——, duly proved the said will, and took upon themselves the burthen of the execution thereof, and the said L. M. then administered divers goods and chattels which were of the said G. H. at the time of his death, as executor of the last will and testament of the said G. H. And the defendant brings here into Court the letters testamentary of the said G. H. deceased, which fully prove that the defendant and the said L. M. were and are executors of that will, and have the execution thereof, &c. And the defendant further says, that the said L. M. is still living, and at the time of the commencement of the suit was and still is resident within the jurisdiction of this Court, in the parish of ——, in the county of ——, and this the defendant is ready to verify; wherefore inasmuch as the said L. M. is not named as a defendant in the said writ and declaration, the defendant prays judgment of the same writ and declaration, and that the same may be quashed, &c. [*Add counsel's signature and affidavit of truth, as ante,* 16.

Misnomer abolished by 3 & 4 W. 4, c. 42, s. 11.

The 3 & 4 W. 4, c. 42, s. 11, abolished *pleas in abatement of misnomer,* and enables a defendant by summons to cause the declaration to be amended, at the cost of the plaintiff, by inserting the right name. If a person is wrongly described in *mesne* process he may take advantage of the error, but if he fails to do so, for the purposes of the action, and of all the consequences of the action, he admits that the name used is his name, and he cannot afterwards retract that admission; *Fisher* v. *Magnay,* 1 Dowl. & Lowndes's Rep. 40.

(*x*) See forms 2 Rich. C. P. 2; 1 Wentw. 13, 58. The plea must aver that the omitted executor administered; 1 Moore & P. 678; 1 Lev. 161; and see form 1 Wentw. 58.

PLEAS IN ABATEMENT.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

Plea in abatement, of another action depending on the same promises. (*y*)

D. and another } pray judgment of the said writ and declaration, because they say
vs. } that before the issuing of the writ in this action or the plaintiffs
B. and another. } declaring thereupon, to wit, on the 8th day of May, in the year of

And the defendants, by Y. Z. their attorney, [*or* "in person,"] our Lord ——, the plaintiffs issued a certain writ of summons out of the Court of our lady the queen, before the queen herself, against and directed to the said now defendants, and whereby our said lady the now queen commanded the said now defendants that within eight days after the service of the same writ on the said defendants respectively, they should cause an appearance to be entered for them in the said Court of Queen's Bench in an action on promises, [*as in the writ,*] at the suit of the said plaintiffs, and which same writ was indorsed as follows, "the plaintiffs claim £100 for debt and £2 for costs," and the said now defendants thereupon afterwards, to wit, on the 16th day of May, in the year aforesaid, in due time and manner, did duly cause an appearance to be entered for them in the said Court to the said writ at the suit of the said plaintiffs, in pursuance of and in obedience to the same writ, as by the record and proceedings thereof remaining in the said Court of our said lady the queen, before the queen herself, to wit, at Westminster aforesaid, more fully appears, (*z*) and

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(*y*) The present form was considered sufficient in *Abbott and another* v. *Raphael and another*, June, 1835. This plea cannot be pleaded *in bar*, 5 B. & A. 101; Lutw. 33; 3 Inst. 1, 56; unless in a penal action, Sayer, 216. As to these pleas in general, see Com. Dig. Abatement, H. 24; Bac. Abr. Abatement, M.; 1 Campb. 60; and the precedents nearly similar to the above in 1 Went. 81; 1 Mod. 6; Lil. Ent. 2, 7, 11; see form and law, 2 Dowl. 659. The pendency of an action in an inferior Court cannot be pleaded to an action for the same cause in the superior Courts; *Laughter* v. *Taylor*, 8 Dowl. 776. The precedents of pleas in abatement of another action depending vary in point of form; sometimes they set forth the declaration in the first action, but others are more concise. Precedents of the first description are in 3 Ld. Raym. 53; Clift. Ent. 2, 22; 1 Mod. Ent. 10; 2 Salk. 716; 1 Wentw. 44, 52, 64; 3 Wentw. 140; and in *scire facias*, 2 Lil. Ent. 392. Those of the latter description are in 3 Ld. Raym. 57; Lutw. 33; Lil. Ent. 7; Mod. Ent. 6; Clift. Ent. 8; 1 Wentw. 8. It was said that when the writ was general, and did not express the cause of action, the plea in abatement *must* have shown that the plaintiff *declared* in the former suit, because otherwise it could not have been traversed whether or not it were for the same cause of action, 5 Co. 61 b, and Lil. Prac. Reg. 8, E.; Bac. Abr. tit. Abatement, M.; but this reason does not appear satisfactory, for in most instances, and particularly in declarations in *indebitatus assumpsit*, the declaration is so general, that it does not conclusively show that the two actions are for the same cause; see 6 T. R. 307; 3 Went. 142. And by the plaintiff's particulars of demand in the first action or otherwise, it may appear what was the subject-matter of the first action, though the plaintiff may not have declared; and it is now settled, that in a plea in bar of *judgment recovered*, it is not necessary to set out the declaration in the former cause, 1 Saund. 92, note 2; and therefore we may conclude that the above concise form would suffice. If, however, it appear from the pleadings that the action pending *could not be* for the same cause, the plea would be bad; 4 B. & C. 920; 7 D. & R. 409, S. C. Therefore where the assignees of a bankrupt declared on promises to the bankrupt, and also on promises to themselves, and the defendant pleaded generally to the *whole*, the pendency of a prior action by the *bankrupt*, it was held bad; *Id.*

Sometimes the plea commences and concludes with a prayer of judgment whether the defendant ought to be *compelled to answer*, &c. Lil. Ent. 6; but the above form seems most correct.

When it is necessary to state a particular day; 2 Lev. 141; 3 Burr. 1423; 1 Bla. Rep. 439, S. C.

As to the averment that the first action is still pending, see Bac. Abr. Abatement, M. *Sed quære*, see opinion, 1 Wentw. 8.

It should seem it is not necessary to aver a *prout patet per recordum*, or to plead the record of another Court *sub pede sigilli*, because the plea involves a matter of fact, whether both actions are for the same cause of action; see 1 Stra. 522. See a plea of pendency so concluding, and law thereupon, *Kirby* v. *Seggers*, 2 Dowl. 659.

(*z*) As to the averment, see *Kirby* v. *Seggers*, 2 Dowl. 659.

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the said defendants further say that the parties in this and the said former suit are the same and not other or different persons, and that the said writ so issued on the said 8th day of May as aforesaid was issued and prosecuted by the said plaintiffs upon and for and in respect of the breach of the very same identical promises in the said declaration in this present suit, and now pleaded to, mentioned. And the said defendants further say that the said plaintiffs, after the said defendants had so appeared to the said writ so issued on the said 8th day of May as aforesaid, and whilst the said suit was depending, to wit, on the 21st day of May in the year aforesaid, issued a certain other writ of summons against and directed to the said defendants, and whereby our said lady the queen commanded the said now defendants that within eight days after the service of that writ on the said defendants respectively they should cause an appearance to be entered for them in the said Court in an action on promises at the suit of the said plaintiffs, and which said last mentioned writ was also indorsed as follows, to wit, "The plaintiffs claim £400 for debt, and £2 for costs;" and the said defendants duly caused an appearance to be entered for them in the said Court to the said last mentioned writ, in pursuance and obedience to the same as aforesaid, and thereupon the said plaintiffs declared thereon and upon the same identical promises as aforesaid. And the said defendants further say, that the said former writ and action so issued and prosecuted against them the said defendants by the said plaintiffs as aforesaid, is still depending in the said Court of our said lady the queen, before the queen herself, and this the said defendants are ready to verify; wherefore they pray judgment of the said writ in this suit and the declaration thereon founded now pleaded to, and that the same may be quashed.

[*Signature of counsel.*]

Affidavit of truth of such plea. (*a*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

Between { Harris Abbott and Thomas Browning, suing as assignees of James Barber, a bankrupt, plaintiffs, and Alexander Raphael and John Illidge, defendants.

—— of ——, one of the above named defendants in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and fact.

Sworn, &c. [*Signature of deponent.*]

Plea, death of the plaintiff since the commencement of the action.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

D. ats. B. } And the defendant, by ——, his attorney, prays judgment of the said writ and declaration, because he says that after the commencement of this suit, and before this day, to wit, on the —— day of ——, A. D. ——, the said plaintiff died, and this the defendant is ready to verify; wherefore he prays judgment if the said Court will *further* proceed in this suit. (*b*)

(*a*) As to this affidavit see *ante*, 11, and notes.

(*b*) As to this conclucion, Com. Dig. Abatement, I. 12; 3 Lev. 120; 4 East, 502; 2 Saund. 209 e, note.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

D. ats. B. } And the said defendant, by Y. Z. his attorney, prays judgment of the said writ and declaration thereon, because he saith that the said plaintiff, at the time of commencing his said suit and declaring thereupon as aforesaid, was within the age of twenty-one years, to wit, of the age of nineteen years, and no more, and that nevertheless the said plaintiff hath declared on his said writ against the said defendant in this Court here by Y. Z. his attorney, whereas by the law of the land the said plaintiff ought to have declared in this suit by his next friend, or by his guardian in the said Court here admitted, and this the defendant is ready to verify; wherefore the defendant prays judgment of the writ aforesaid and the said declaration, and that the same may be quashed, [*or according to* 1 *Wentw.* 58, "If the said defendant to the said declaration ought to be compelled to answer."] [*Counsel's signature must be subscribed, and an affidavit of truth annexed, as ante*, 11.

Plea, that plaintiff is an infant, and ought to have declared by his next friend or guardian, and not by attorney. (*c*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

D. ats. B. } And the said defendant, by J. S. his attorney, prays judgment of the writ and declaration aforesaid, because he says that by the said declaration it appears that the aforesaid plaintiff complains of several and distinct causes of action, when by the law of the land the said plaintiff ought to have issued several writs, and have declared separately for the said causes of action respectively, and not one writ or declaration only for all the causes of action aforesaid together; and this the said defendant is ready to verify; wherefore inasmuch as the said plaintiff hath above joined in one and the same writ and declaration many causes of action not joinable, the said defendant prays judgment of the said writ and declaration, and that the same may be quashed. [*Counsel's signature.*]

Plea in abatement, for the *mis-joinder* of several inconsistent causes of action in one declaration. (*d*)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

Hembrow ats. Butler. } And the said defendant, by Thomas Brown, his attorney, says, that after the death of the said Richard Hembrow, and before the commencement of this suit, to wit, on the —— day of ——, in the year of our Lord ——, administration of all and singular the goods, chattels and credits, which were of the said Richard Hembrow at the time of his death, with the will of him the said Richard Hembrow annexed, by James, by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, in due form of law, was granted to the said defendant, as by the letters of administration of the said Archbishop, which the said defendant now brings here into Court, more fully appears; and this he the said defendant is ready to verify; wherefore inasmuch as he is *not* named or described in the writ and declaration aforesaid as administrator of

Plea in abatement, to a declaration against the defendant as executor, that he is administrator with the will of deceased annexed. (*e*)

Profert.

(*c*) See form 1 Wentw. 58; Clift. Ent. ; 2 Saund. 209 a.

(*d*) Misjoinder, when apparent on the face of a declaration, is now in general the ground of demurrer.

(*e*) See Thompson's Entries, 221.

PLEAS IN ABATEMENT.

all and singular the goods, chattels and credits, which were of the said Richard Hembrow at the time of his death, with the will of the said Richard Hembrow annexed, he the said defendant prays judgment of the writ and declaration, and that the same may be quashed, &c.

Affidavit of truth.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

Between { Charles Butler, plaintiff, and Thomas Hembrow, defendant,

Thomas Hembrow, of No. 17, Oxford Street, in the parish of St. Mary-le-bone, in the county of Middlesex, linen-draper, maketh oath and saith that the plea hereunto annexed is true in substance and matter of fact.

Sworn, &c.

Plea, that defendant is administratrix and not executrix.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

D. ats. B. } And the said W. and Ann, his wife, by A. D. their attorney, say that the said R. C. died intestate, heretofore, to wit, on &c., and that after the death of the said R. C. and before the commencement of this suit, to wit, on &c. [*the proper date*] administration of all and singular the goods, chattels and credits, which were of the said R. C. deceased at the time of his death, by John, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan, in due form of law was granted to the said Ann, as by the said letters of administration of the said Archbishop now brought here into Court more fully appears, without this that the said Ann is executrix of the last will and testament of the said R. C. deceased, or ever administered any of the goods or chattels which were of the said R. C. at the time of his death, as executrix of the last will and testament of the said R. C., as in and by the said declaration is above supposed, and this they the said W. and Ann, his wife, are ready to verify; wherefore they pray judgment of the said writ and the declaration thereon founded, and that the same may be quashed, &c.

Plea in abatement, that defendant is executrix and not administratrix as declared against.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

D. ats. B. } And the said defendant in person prays judgment of the said writ and declaration thereon, because the said defendant says, that the said Thomas Wilkinson, her said late husband, in his lifetime, to wit, on &c. [*the date of the will*] duly made his last will and testament in writing, and therein and thereby constituted, nominated and appointed the said defendant executrix thereof, and afterwards, to wit, on &c., the said Thomas died, after whose death, to wit, on &c. the said defendant, as such executrix, duly proved the said last will and testament of the said Thomas, and took upon herself the burthen of the execution thereof, and which said will at the death of the said Thomas was and yet is in full force, and not made void or set aside. And the said [*profert of letters testamentary*]; wherefore the said defendant ought to have been sued in this action as executrix of the last will and testament of the said Thomas, and not as administratrix of all and singular the goods and chattels, rights and

credits which were of the said Thomas at the time of his death, and this she is ready to verify; wherefore she prays judgment of the said writ and declaration, and that the same may be quashed, &c.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of —— A. D. ——.

Plea in abatement by one of several defendants, where the writ would abate only *as to him.*

D. } sued with } others ats. B. } And the said defendant, C. D., by Y. Z. his attorney, [*or* "in person,"] prays judgment of the writ and declaration in this action against him the said C. D. because he saith [*here state the privilege or other ground on which the writ should only abate quoad this defendant, and conclude as follows:*] And this the defendant C. D. is ready to verify; wherefore he prays judgment that the said writ and declaration thereon as to him the said C. D. may be quashed, &c.

PLEA IN ABATEMENT AS TO PART, AND IN BAR TO RESIDUE.

PLEA IN ABATEMENT AS TO PART, AND IN BAR TO RESIDUE.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——.

Plea to part, non-assumpsit and coverture in bar, and to the residue in *abatement* defendant's *coverture.* (*f*)

1st, To part non-assumpsit.

2ndly, To same counts, defendant's *coverture in bar.*

D. } ats. B. } And the defendant in person as to the said [*first and second*] counts of the said declaration says that she did not promise in manner and form as the plaintiff hath above complained against *her*; and of this she puts herself upon the country, &c. And for a further plea as to the said [*first and second*] counts of the said declaration the defendant saith that she, the defendant, before and at the time of the making of the said promises in the said [*first and second*] counts mentioned, and before and at the time when the said supposed causes of action therein mentioned did accrue, was and still is the wife of T. J., who is still living; and this the defendant is ready to verify, &c. And as to so much and such part of the said writ and declaration of the plaintiff as relates to the said several supposed promises in the said [*third and subsequent*] counts mentioned, and as to those counts the defendant prays judgment of that part of the said writ and declaration which relates to the said last-mentioned promises, and of the said third and subsequent counts, and that they may be respectively quashed, because she says that before and at the time of the commencement of this suit, she was and still is married to the said T. J., who is still living and resident within the jurisdiction of this Court, to wit, in the parish of ——, in the county of ——, and this she is ready to verify; wherefore because the said T. J. is not named in the said writ and declaration in this behalf, she prays judgment of so much and such part of the said writ and declaration as relates to the said promises in the said third and subsequent counts mentioned, and also of the said third and subsequent counts, and that the same may in that behalf be quashed, &c. [*Add signature of counsel, and annex affidavit of truth of the last plea, as ante,* 11.

3dly, To third and subsequent counts, *existing coverture* of defendant *in abatement.*

(*f*) See *ante*, vol. i. 475; 2 Saund. 209, 210; 5 Term Rep. 557; 1 M. & P. 26; 2 Bos. & Pul. 420; *Hill* v. *White*, 6 Bing. N. C. 26; 8 Dowl. 13, S. C.; *Phillips* v. *Claggett*, 2 Dowl. N. R. 258, as to pleading in bar and abatement at the same time; and see *ante*, vol. i. 506, as to whether coverture should be specially pleaded in bar.

VI. PLEAS IN BAR IN GENERAL.

I. GENERAL RULES AS TO PLEAS IN BAR.

Reg. Gen. Hil. T. 4 W. 4, reg. 1. Title or date.

Reg. Gen. Hil. T. 4 W. 4, reg. 1, orders that "Every pleading shall be intituled of the day of the month and year when the same was pleaded, and shall bear no other time or date."

Reg. 9, That the allegation of *actionem non* and *prayer of judgment* shall be unnecessary. Exception in case of *estoppel*.

Reg. 9 orders that "In any plea intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; and all pleas pleaded without such formal parts shall be taken, unless otherwise expressed, as pleaded in bar of the whole action; provided nothing herein contained shall extend to cases where an estoppel is pleaded."

Reg. 10, *Formal defence* unnecessary. Prescribed forms of commencement.

Reg. 10 orders that "No formal defence shall be required in any plea, and it shall commence as follows: 'The said defendant, by ——, his attorney, [*or* 'in person,'] says that, &c.'"

Reg. 11, "By leave of Court" need not be stated. (*a*)

Reg. 11 orders that "It shall not be necessary to state in a second or other plea or avowry that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect."

Reg. 13, Traverses are to conclude to country. But when the traverse is immaterial the opponent may plead over to the inducement.

Reg. 13 orders that "All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country: provided that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial."

Reg. 5, Several pleas when not allowed.

Reg. 5 orders that "Several pleas or avowries or cognizances shall not be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each."

Reg. 12, No protestation to be made.

Reg. 12 orders that "No protestation shall hereafter be made in pleading, but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made."

Reg. 8, *No venue* to be stated in a plea or subsequent pleading, excepting in case of local description.

Reg. 8 orders that "No venue shall be stated in any pleading: provided that in cases where local description is now required such local description shall be given."

(*a*) Before this rule, when a second plea was pleaded by leave of the Court under 4 Ann. c. 16, s. 4, 5, in order to prevent the pleading from being treated as defective for duplicity, it was considered proper to state at the commencement of a second or subsequent plea that it was pleaded by leave of the Court first obtained, pursuant to that statute, and still a rule must be obtained. See Andr. 108; 1 Wils. 219; Cowp. 500; 1 Hen. Bla. 275, 278.

II. FORMS OF COMMENCEMENTS OF PLEAS IN BAR IN GENERAL.

FORMS OF COMMENCEMENTS.

In the Queen's Bench, [*or* " C. P." *or* " Exch. of Pleas."]

The —— day of ——, A. D. ——.

Title.

D. ats. B. } The defendant, by Y. Z. his attorney, [*or* " in person," &c.] says that (*b*) [*here state the subject-matter of defence, and conclude with a verification, or to the country as below.*

Commencement of a plea to the *whole action* generally.

And for a further plea in this behalf the defendant says that ——

Commencement of a *second* or other plea to the whole action.

D. ats. B. } The defendant by Y. Z. his attorney, [*or* " in person,"] as to so much of the *first count* of the said declaration as relates to the sum of £——, part of the money therein mentioned, [*or* " as to so much of the said declaration as relates to, &c." *or* " as to the said alleged breach in the said declaration first assigned;" *or if in trespass*, " as to the breaking and entering, &c." *enumerating such of the particular trespasses mentioned in the declaration as are to be afterwards justified in the body of the plea*], says that [*here state the subject-matter of defence.*

Commencement of a plea *in bar* to *a part* of the action.(*c*)

D. ats. B. } The defendant, as to the alleged causes of action in the declaration stated, excepting those hereafter enumerated and pleaded to in the 2nd and 3rd pleas, saith that he did not promise in manner and form as the plaintiff hath in his said declaration alleged; and of this he puts himself upon the country, &c. And as to [*then enumerate the matters that are afterwards to be pleaded to and justified.*

The like, in a more concise form.

D. ats. B. } And the defendant, by Y. Z. his attorney, craves oyer of the said alleged letters of administration [*or* " probate," *or* " writing obligatory," *or* " indenture,"] in the said declaration mentioned, and they [*or* " the same,"] are read to him in these words, &c. [*here set out the document verbatim,*] which being read and heard, the defendant says that, &c. [*then state the subject-matter of the defence; and if new matter be stated, conclude with a verification; see a plea of* ne unques *administrator, post.*

Commencement of a plea craving oyer of and setting forth letters of administration or other documents whereof profert has been made in declaration.

D. ats. B. } And the defendant, by Y. Z. his attorney, says that the said plaintiff ought not to be admitted to say &c. [*stating the allegation to which the estoppel relates,*] because he saith that &c. [*showing the matter of estoppel. See forms in Stephen on Pleading, 5th edit. 251, and* Doe v. Huddart, 4 *Dowl.* 437. *Matter of estoppel more usually occurs in a*

Commencement of a plea of matter of *estoppel.*

(*b*) Before the above Reg. Gen. Hil. T. 4 W. 4, reg. 9, there was always more verbiage and circumlocution in the commencement of a plea, the defendant first stating that the plaintiff ought not to have or maintain his action thereof against him, *because* the defendant saith that, &c.; but now the form is more commences with the statement of the answer to the declaration. See *post*, 31, note (*u*).

(*c*) See the form in trespass before the 4 & 5 Anne, c. 16, 1 Saund. 10, 24, 82, 295: *Bird* v. *Higginson*, 4 Nev. & Man. 505; 1 Harr. & Wol. 61, S. C. The common counts are *several* counts, as well for the purposes of *pleading* as of costs, *Jourdain* v. *Johnson*, 2 Crom. M. & Ros. 564; 5 Tyr. 421, S. C.; and great care is essential in stating the causes of action intended to be justified; *id. ibid.* See *post*, 31, note (*u*).

FORMS OF COMMENCEMENTS.

replication or subsequent pleading than in a plea. See the several forms, post, tit. Replication.

Commencement of a plea where the matter of defence *arose after* the commencement of the action. (*d*)

The defendant, by Y. Z. his attorney, saith that the plaintiff ought not *further* to maintain his said action thereof against the defendant, because he saith that &c. [*See post, tit. Pleas of Matter pending Action.*

FORMS OF CONCLUSIONS.

III. FORMS OF CONCLUSIONS OF PLEAS IN BAR IN GENERAL.

Usual conclusion to the country.

And of this the defendant puts himself upon the country, &c.

Usual conclusion with a verification.

And this the defendant is ready to verify, &c. (*e*)

Conclusion of a plea in bar of the further maintenance of the action.

And this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought *further* to maintain his action, &c.

Conclusion with a verification by the record. (*f*)

As by the record of the said writ [*or* "cognizances," *or* "judgment,"] remaining in the said Court fully appears; and this the defendant is ready to verify by the said record, &c.

(*d*) See Reg. Gen. Hil. T. 4 W. 4, reg. 2, *ante*, vol. i. Appendix; as to pleading matter of defence arising pending suit, and *within eight days*, and of the accompanying affidavit, and the forms of such pleas, *post*; and see the cases before that rule 4 East, 502; and the old form, Chitty on Pleading, vol. iii. 6th edit. 913.

(*e*) Always essential when plea states new matter; 1 P. W. 258.

(*f*) As to this conclusion, *ante*, vol. i. 582; and see *post*, form of set-off on a judgment or recognizance.

VII. PLEAS IN BAR IN ASSUMPSIT.

DENYING PLAINTIFF *EVER HAD* A CAUSE OF ACTION.

THAT PLAINTIFF NEVER HAD CAUSE OF ACTION.

Observations on the proper application of a plea of non assumpsit.—Before the pleading Rules of Hil. Term, 4 W. 4, the plea of *non assumpsit* was admissible to a most absurd, illogical, and inconvenient extent, and plaintiffs were in many cases taken by surprise at the trial by an unexpected ground of defence being given in evidence. A defendant might plead *non assumpsit*, and under it give in evidence *payment*, *accord and satisfaction*, *release*, and numerous other grounds of defence. That Rule orders as follows:—

Plea of *non-assumpsit* when or not proper, and what admissible under it.

LIMITED OPERATION OF CERTAIN PLEAS.

IN ASSUMPSIT.

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the *express contract* or promise alleged, or of the matters of fact from which the contract or promise alleged may be *implied by law.*

Plea of non assumpsit to be considered as putting in issue only *express* contract or the *facts* on which a promise might be implied,

Ex. gr.—In an action on a warranty the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

and not the breach of express contract; or in action on a policy, of the interest of assured, &c.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any *express contract* to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In action against carrier or bailee, not of breach.

In an action of indebitatus assumpsit for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

In indebitatus for goods sold or money received, non assumpsit to put in issue only sale and delivery, and receipt of money to use of plaintiff.

2. In all actions upon *bills of exchange and promissory notes* the plea of *non assumpsit shall be inadmissible.* In such actions, therefore, a plea in denial must traverse some matter of fact, viz. the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

The plea of non assumpsit to be inadmissible in an action on a bill of exchange or promissory note, but the defendant must traverse in particular the drawing, making, indorsing, accepting, presenting, or notice of dishonour.

THAT PLAINTIFF NEVER HAD CAUSE OF ACTION.

3. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded:—*ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes *by way of accommodation*;—Set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

Matters in confession and avoidance, and in discharge, and defences in law, to be pleaded particularly, as infancy, coverture, release, payment, performance, illegality of consideration, &c.

When or not the plea of *non-assumpsit*, or that defendant did not promise, is *now* proper.

Observations.—In order to determine the proper use and application of the plea of non-assumpsit, the terms or forms of a common indebitatus assumpsit count and of a special count in assumpsit should be well considered. An indebitatus count as well at common law as since the concise form prescribed by Reg. Gen. Trin. T. 1 W. 4, states, "That the defendant, on a named day, (usually a day after the debt was completely due,) was indebted to the plaintiff in the sum of £—— (the precise amount is immaterial,) for goods sold and delivered by the plaintiff to the defendant at his request, or for work and labour done and performed by the plaintiff for the defendant at his request, and that the defendant, in consideration thereof, promised the plaintiff to pay him the said sum on request."

The plea of non-assumpsit states that the defendant "did not promise in manner and form as the plaintiff hath above alleged, and of this the defendant puts himself upon the country, &c."

By the terms of the above rule the plea of non-assumpsit is to operate only in denial in fact of the express contract or promise alleged (i. e. in a special count), or of the matters of fact, from which the contract or promise alleged may be implied by law; now, in general, the promise alleged in an indebitatus count is only implied from the plaintiff's proof that the alleged debt had been contracted and was completely due and actually payable before the action was commenced: the plea of non-assumpsit to an indebitatus count, therefore, in effect, denies that the alleged debt was due, and also denies that the implied promise to pay on request had been made.

It seems, therefore, to result, that whenever at common law no debt has become completely due, no special plea is necessary; and that, therefore, pleas to an indebitatus count for goods sold, that they were sold on a credit not elapsed at the commencement of the action, or that the goods were not equal to the sample or agreed quality, and were therefore rejected, and other pleas of that nature, are wholly unnecessary; and the plea of non-assumpsit would suffice, unless the defendant has accepted or derived partial benefit, in which case he should plead non-assumpsit, except as to a part of the sum claimed, and plead payment of that sum into Court.

But cannot plead *specially* matter that would amount to the *general issue*.

The Pleading Rules of Hil. T. 4 W. 4, though certainly they render it more frequently necessary to plead particularly or specially the grounds of defence than before, yet never were intended to alter in practice the ancient rule, that a defendant cannot plead specially matter that would amount to the general issue, and such a plea would be demurrable. See *Gregory* v. *Hartnoll*, 1 Tyr. & Gr. 303; *Worrall* v. *Greyson*, 1 Tyr. & Gr. 477; *Crawshay* v. *Barry*, 1 M. & Gr. 235; *Sutherland* v. *Pratt*, 11 M & W. 312.

THAT PLAINTIFF NEVER HAD CAUSE OF ACTION.

So although it has been usual to plead to an action by an apothecary, that he was not legally competent to practise; yet as in that case a particular statute has enacted that the plaintiff shall not recover unless he first prove that he was authorized to practise as an apothecary, a plea of non-assumpsit, of itself, and without any express plea, is sufficient to enable the defendant to defeat the action.

The practitioner must always ascertain whether the general issue or a general form of traverse or special plea has or not been given by express enactment in each particular case, and prepare the proper plea accordingly.

In cases of doubt the pleader should prepare as well the plea of non assumpsit as every other special plea that the case could possibly require; and the practitioner should endeavour to obtain a judge's order for leave to plead all such pleas. But as costs would be payable upon every plea unsupported in evidence, in no case should any matter be pleaded that cannot in all probability be established in evidence.

The following is a list of a few cases when the ground of defence may be given in evidence under a plea of non-assumpsit.

1. The want of a sufficient stamp may be given in evidence, but then there must be a plea traversing the contract. (*a*)
2. No consideration may be given in evidence to an indebitatus count; but in case of a special count it must be pleaded specially or traversed. (*b*)
3. Statute against Frauds, 29 Car. 2, c. 3, s. 1, 4, 17. (*c*)
4. That goods, &c. were not according to contract, and were not accepted, or were returned. (*d*)
5. A part of contract not performed by plaintiff, and no benefit to defendant. (*e*)
6. That goods delivered are of no value. (*f*)
7. Credit not expired. (*g*)
8. Apothecary not competent to practise. (*h*)

(*a*) 23 Geo. 3, c. 49; 55 Geo. 3, c. 184; *Jerdine* v. *Payne*, 1 Bar. & Adol. 663; Rosc. Tracts, 36; *Haward* v. *Smith*, 4 Bing. N. C. 684.

(*b*) *Passenger* v. *Brooks*, 1 Bing. N. C. 587; 1 Scott, 566, S. C.; 5 Moore & Scott, 95; *Cousens* v. *Paddon*, 2 C. M. & R. 547.

(*c*) *Buttemere* v. *Hayes*, 5 M. & W. 461; *Johnson* v. *Dodgson*, 2 M. & W. 653; *Fricker* v. *Thomlinson*, 1 M. & G. 772; *Eastwood* v. *Lenyon*, 11 A. & E. 441; 3 P. & D. 276, S. C. A special plea of the statute is bad; *Leaf* v. *Tuton*, 10 M. & W. 393.

(*d*) This defence is admissible under non-assumpsit to an indebitatus count for goods bargained and sold, and need not be specially pleaded; see *Flight* v. *Booth*, 1 Scott, 190; 1 Bing. N. C. 370, S. C.; *Cousens* v. *Paddon*, 2 C. M. & R. 547; *Smith* v. *Dixon*, 7 A. & E. 1. But if the goods, or a part, have been kept or consumed, then the defendant will be liable to pay their value, and should pay and plead payment into Court, *pro tanto*.

(*e*) This defence may be given in evidence under non-assumpsit to an indebitatus count, and need not be pleaded; see *Oxendale* v. *Wetherell*, 9 B. & C. 386; *Shipton* v. *Casson*, 5 Bar. & C. 383; *Gardner* v. *Alexander*, 3 Dowl. 146; 5 M. & Scott, 281; 1 Bing. N. C. 671, S. C.; *Randall* v. *Skey*, 4 Dowl. 682.

(*f*) *Cousens* v. *Paddon*, 4 Dowl. 492, 493; *Gregory* v. *Hartnoll*, 4 Dowl. 699, over-ruling *Roffey* v. *Smith*, 6 Car. & P. 662.

(*g*) It appears to have been doubted whether or not this defence should be specially pleaded; see *Gardner* v. *Alexander*, 3 Dowl. 149; *Taylor* v. *Hillary*, 1 C. M. & R. 741; 1 Gale, 23; 1 Cro. M. & R. 741, S. C.; 3 Dowl. 401, S. C.; *Knapp* v. *Harden*, 1 Gale, 47; contrary to *Edmonds* v. *Harris*, 4 Nev. & M. 182; 6 Car. & P. 547, 745, S. C.; *Bromfield* v. *Smith*, 1 M. & W. 542. To an indebitatus count such a plea would be bad, as amounting to general issue; *Cousens* v. *Paddon*, 4 Dowl. 492; *Gregory* v. *Hartnoll*, 4 Dowl. 699, over-ruling *Roffey* v. *Smith*, 6 Car. & P. 662.

(*h*) This defence is founded on 55 Geo. 3, c. 149, s. 21; and 6 Geo. 4, c. 133, s. 5, and need not be specially pleaded; see the words of 55 Geo. 3, c. 149, s. 21. It was expressly so decided in *Morgan* v. *Ruddock*, 4 Dowl.

No Promise in Fact made.

1. No Promise in Fact made.

In the Queen's Bench, (*k*) [*or* "C. P." *or* "Exchequer of Pleas." (*l*)]
On the —— day of ——, A.D. ——.

Plea of *non-assumpsit* by a single defendant to the *whole* declaration. (*i*)

D. ats. B. } The defendant, by Y. Z. his attorney [*or* "in person,"] saith that (*m*) he did not promise [*or if the declaration or particular count pleaded state that the defendant* "agreed and undertook and promised," *then perhaps the plea should state that* "the defendant did not agree, undertake or promise," (*n*)] in manner and form as the plaintiff hath above thereof complained against him. And of this he puts himself upon the country, (*o*) &c. (*p*)

Plea of non-assumpsit to *one count*. (*q*)

D. ats. B. } The defendant, by Y. Z. his attorney, as to the first count of the said declaration saith that he did not promise in manner and form as the plaintiff hath in his said first count alleged. And of this the defendant puts himself upon the country, &c. (*r*)

The like plea to a *part* of *monies*, the rest of which are afterwards pleaded to in another plea.

D. ats. B. } The defendant, by —— his attorney, except as to £——, parcel of the monies in the said declaration [*or* "—— count"] mentioned, saith that he did not promise in manner and form as the plaintiff hath in his said declaration alleged. And of this the defendant puts himself upon the country, &c. (*s*)

Second plea to whole declaration or to entire count.

And for a *further* (*t*) plea in this behalf to the first count of the said declaration, the defendant saith that, &c. [*here state the subject-matter of defence; and if it contain new* matter, *conclude with a verification, thus:*] And this the defendant is ready to verify, &c.

311; *Shearwood* v. *Hay*, and *Wills* v. *Langridge*, 5 A. & E. 383; and this even though a tender had also been pleaded. See, however, form of special pleas, *Woodward* v. *Ball*, 6 Car. & P. 577; and see generally as to the admissibility of evidence under the general issue in assumpsit, *ante*, vol. i. p. 492, &c.

(*i*) See the older forms, Morgan, 217; 1 Rich. C. P. 147.

(*k*) The plea should be intituled of the *proper Court*.

(*l*) Reg. Gen. Hil. T. 4 W. 4, reg. 1, requires *every plea* to be intituled on the day it is delivered.

(*m*) The form of commencement is thus prescribed in the alternative by Reg. Gen. Hil. T. 4 W. 4, reg. 9.

(*n*) If the declaration stated an *agreement*, and an *undertaking*, and a *promise*, then the practice has been in the plea to deny *each*; 3 Dowl. & Ryl. 621. See pleas in denial of inducement in an action on a warranty, *Shepherd* v. *Pyms*, 3 M. & G. 870. A plea of *not guilty* would be bad on demurrer, but the plaintiff could not regularly sign judgment as by *nil dicit*; 2 Stra. 1022; Cas. T. Hardw. 173. A plea to indebitatus assumpsit for work done as an attorney, that he acted gratuitously, is bad, as amounting to the general issue; *Jones* v. *Manney*, 3 C. M. & R. 333; *Grounsell* v. *Lamb*, 3 C. M. & R. 336.

(*o*) Every plea in bar must conclude to the country, or with a verification, viz. *to the country*, when it merely denies matter of fact; but *with a verification* when the plea has stated *new* matter; 1 P. Wms. 258; *Goodchild* v. *Pledge*, 3 C. M. & R. 363.

(*p*) The *&c.* need not be added by the defendant. If added, it may supply the want of a similiter; 6 Car. & P. 712.

(*q*) Each plea in these cases should have a distinct proper conclusion; 1 Crom. M. & Ros. 523, note (*a*).

(*r*) See general form applicable to all actions, *ante*, 25.

(*s*) This plea to part only of the cause or causes of action should be pleaded as a *distinct* plea to a part only of the declaration, and should have a distinct conclusion to the country; 1 Crom. M. & Ros. 523, note (*a*).

(*t*) When a plea is merely to a *distinct part* of a declaration not before pleaded to, the word "*further*" is to be omitted; 1 Crom. M. & Ros. 523, note (*a*).

No Promise in Fact made.

And for a further plea in this behalf, as to the sum of £——, parcel of the said sum of money in the first count mentioned, the defendant saith that, &c. [*state the subject-matter of defence, and if new matter has been stated which is traversable, conclude thus:*] And this the defendant is ready to verify, &c.

Plea to *part* of a count. (*u*)

D. & another ats. B. } The defendants, by Y. Z. their attorney, *say* (*x*) that *they* (*x*) did not promise in manner and form as the plaintiff hath above thereof complained against them. And of this they put themselves upon the country, &c.

Plea of *non-assumpsit* by several defendants.

D. sued with others, ats. B. } The defendant, the said C. D., by Y. Z. his attorney, saith that he, *together with the said E. F. and G. H.*, [*the other defendants,*] (*z*) did not *promise* in manner and form as the plaintiff hath above complained. And of this the said C. D. puts himself upon the country, &c.

Plea of non-assumpsit by one of several defendants sued jointly, but who pleads separately. (*y*)

D. and E. his wife, ats. B. } The defendants, by Y. Z. their attorney, say that she, the said E., did not promise as in the said declaration is alleged. And of this they the defendants put themselves upon the country, &c.

Plea by husband and wife that she non-assumpsit.

D. executor, &c. [*or* "administrator, &c."] ats. B. } The defendant, by Y. Z. his attorney, saith that the said G. H., deceased, in his lifetime, did not promise [*and if a promise by the defendant as executor be laid in the declaration, then here add,* "nor did the said defendant promise,"] in manner and form as the plaintiff hath above thereof complained. And of this the defendant puts himself upon the country, &c.

Non-assumpsit by an executor or administrator. (*a*)

By Statute. D. ats. B. } The defendant, by Y. Z. his attorney, saith, that he did not promise in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant puts himself upon the country, &c.

Non-assumpsit when that plea or general issue is *allowed by statute*, and special matter may be given in evidence under it. (*b*)

(*u*) Reg. Gen. Hil. T. 4 W. 4, No. 9, provides that "in a plea or subsequent pleading intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, or any prayer of judgment, nor shall it be necessary in any replication, or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of 'precludi non,' or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in the maintenance of the whole action; provided that nothing herein contained shall extend to cases where an estoppel is pleaded." The phrase "whole action" is to be understood as applying to a plea pleaded in bar of the whole action, as contradistinguished from a plea in bar of the further maintenance of the action, *Putney* v. *Swann*, 7 M. & W. 72; *Weeding* v. *Aldritch*, 1 P. & D. 657; and that therefore the allegation of actionem non and prayer of judgment are not necessary where the plea, although to part only of a count, is in bar of the action; *Ratton* v. *Davis*, 1 G. & D. 21; but see *Upward* v. *Knight*, 5 Bing. N. C. 338.

(*x*) If several defendants join in a plea, and it be in the singular number, it will be demurrable; Lutw. 1531; Com. Dig. Pleader, E. 35.

(*y*) See forms, 1 Lil. Ent. 106; 2 Rich. C. P. 18, where two of several defendants pleaded non-assumpsit.

(*z*) As in general in assumpsit the plaintiff must prove a *joint contract*, express or implied, by all the defendants, this form of allegation is proper, but a plea that defendant did not promise would suffice; see *Robertson* v. *Sheward*, 1 M. & G. 512, note (*a*).

(*a*) See forms, 1 Rich. C. P. 147. If there be no ground for disputing the alleged promise, it is advisable with reference to costs not to plead this plea, but to rely only on the plea of plene administravit, or other plea that can be sustained in evidence.

(*b*) The 3 & 4 W. 4, c. 42, which empow-

No Promise in Fact made.

Plea confessing causes of action in certain counts, and certain damage thereby sustained, and general issue to the residue. (*c*)

D. ats. B. } The defendant, by —— his attorney, as to the [first and second] [*the counts confessed*] counts of the said declaration mentioned, confesses the said action of the plaintiff as to the non-performance of the said promises in those counts mentioned, and that he the plaintiff, by reason of the non-performance of the said promises in those counts mentioned, hath sustained damage to the amount of —— [*insert enough*], over and above his costs and charges by him about his suit in that behalf expended, and which said sum of —— he the defendant hath always been ready and willing and still is ready and willing to pay to the plaintiff. And the defendant, as to the [*third* and subsequent] counts of the said declaration mentioned, says that he did not promise in manner and form as the plaintiff hath above in those counts complained against him. And of this he puts himself upon the country, &c.

Special denial of any *such* contract or promise in *fact* as that declared on, viz. to a count for money paid or had and received, that the plaintiff and defendant were partners.

[See the form in *Hammond* v. *League*, 6 Bing. 197. The subject-matter of this plea would be a ground of nonsuit under the general issue, because that plea would compel the plaintiff to prove that the money was paid for the use of the defendant under circumstances that would *imply* his promise to repay the plaintiff, but which, if they were partners, could not be implied: and the same observation applies to the count for money had and received; for if the plaintiff and defendant were partners, then the defendant did not receive the money for the separate use of the plaintiff, and consequently there could be no implied promise to pay, and the plaintiff could not recover, and the general issue would suffice; and therefore it has been held that in an indebitatus assumpsit for money paid and on an account stated, a special plea that the causes of action arose out of partnership transactions, and that the accounts were not balanced, is bad, as amounting to the general issue, *Worrall* v. *Grayson*, 1 M. & W. 166; 1 Tyr. & Gr. 477; *Gregory* v. *Hartnoll*, id. 303; see *ante*, vol. i. 495; *Payne* v. *Hales*, 5 M. & W. 598. See form of plea by one defendant that he was a secret partner with his co-defendants, and that the contract declared on was entered into by the plaintiff with the co-defendants, with a special traverse of the defendant's promise, *Beckham* v. *Knight*, 1 M. & G. 742.]

Plea that the cause of action accrued against

And for a further plea in this behalf, the defendants say that the causes of action in the declaration mentioned accrued against a certain banking

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ered the judges to make rules and orders as to the mode of pleading, provided that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was or thereafter should be entitled so to do, by virtue of any act of parliament then or thereafter to be in force. By Reg. Gen. T. T. 1 Vict. it is ordered "that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an act of parliament, he shall insert in the margin of the plea the words 'by statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue and of the Nisi Prius record." The defendant cannot plead any other pleas with the general issue by statute; *Ross* v. *Clifton*, 1 G. & D. 72; *Legge* v. *Boyd*, 1 M. & G. 898. The power given by any "public local and personal," or "local and personal," or any act of a local and personal nature, to plead the general issue, is taken away by stat. 5 & 6 Vict. c. 97, s. 3.

(*c*) This plea may be advisable in cases where the defendant admits a cause of action against him to a certain extent, but cannot pay money into court, as is frequently the case. By the above mode of confession it should seem that the expenses of a writ of inquiry or trial, upon the admitted cause of action, may be avoided. See a form in case, *post*, and a form to a new assignment in trespass, *post*. See also 9 B. & Cres. 613.

No Promise in Fact made.

co-partnership called "The Southern District Banking Company," established under the provisions of a certain act of parliament passed in the seventh year of the reign of his late majesty King George the Fourth, late king of Great Britain and Ireland, intituled [&c.] and not otherwise, of which said co-partnership the defendants at the time of the accruing of the said causes of action were members; and the defendants further say that the said causes of action accrued against the defendants as such members of such co-partnership and not otherwise, and that the defendants are sued in this action as such members, and not otherwise, in respect of the said causes of action; and the defendants further say that one S. B. and one W. D. had been duly appointed and registered pursuant to the said statute as public officers of the said co-partnership, to sue and be sued for and on behalf of the same according to the said statute, and that the said persons so being, and being duly nominated and appointed and registered as such public officers at the time of the commencement of this suit, were living and resident in England and within the jurisdiction of this Court; and this the defendants are ready to verify, &c.

a banking co-partnership under 7 Geo. 4, c. 46, of which the defendants were members, and that the company ought to have been sued through their public officer. (*d*)

2. Incapacity to Contract, or Want of Free Will.

Incapacity to Contract, or Want of Free Will.

D. ats. B. } The defendant, by E. F. his attorney, [*or if the defendant be still an infant, say,* " by G. H admitted (*f*) by the Court here as guardian (*g*) of the defendant to defend for him, he still being an infant under the age of twenty-one years,"] saith that he the defendant, at the time of making the said promises in the declaration mentioned, was an infant within the age of twenty-one years, to wit, of the age of —— years; (*h*) and this the defendant is ready to verify, &c.

Infancy of defendant pleaded in bar. (*e*)

D. ats. B. } The defendant in person (*k*) saith that she, at the time of making the said alleged promise in the said declaration mentioned, was and still is the wife of one G. D.; and this the defendant is ready to verify, &c.

Coverture of defendant. (*i*)

(*d*) See *Steward* v. *Greaves*, 2 Dowl. N. S. 485.

(*e*) See precedents, 1 Rich. C. P. 153; Plead. Assist. 450; Lil. Ent. 3, 107; plea and replication, 2 Saund. 211, 212; and the useful pleadings in *Burghart* v. *Angerstein*, 6 Car. & P. 690. Infancy might have been given in evidence under the general issue in assumpsit before Reg. Gen. Hil. T. 4 W. 4; 1 Bos. & Pul. 4 81, note (*a*); but now it must be pleaded, *ante*, vol. i. 503. It may be pleaded with another plea. As to the *evidence*, see 3 Stark. 63; 4 Taunt. 463; Roscoe's Evidence, 195—197.

(*f*) This should be stated, 2 Saund. 117 g, note 1.

(*g*) A defendant, *still* being an infant, must defend by guardian, and not by *prochein ami*, 1 Saund. 117 f, note 1; *ante*, 21.

(*h*) The precise age is not here material. The precedent in 2 Saund. 211, here adds "and no more;" but that allegation seems to be unnecessary, and in general improper. The venue used to be inserted here before Reg. Gen. Hil. T. 4 W. 4, but the omission was not demurrable.

(*i*) See form, Morg. 249. Coverture might formerly, in assumpsit and debt on simple contract, have been given in evidence under the general issue, but it was frequently advisable to plead it; 12 Mod. 101. When the defence is not that the feme was married at the time the contract was made, but merely that her husband ought to be joined in the action, the coverture must be pleaded in *abatement*, and not as above in *bar*, *ante*, 14, note (*c*). *Quære* whether the rule of Hil. T. 4 W. 4, requiring coverture to be specially pleaded, applies to coverture arising *after* the contract only, or whether it extends to coverture existing at the time of the contract, when in point of law there would be either no contract at all, or, in the instance of the plaintiff's coverture, a contract between the husband and the defendant; *Moss* v. *Smith*, 1 M. & G. 232, note (*a*).

(*k*) If the defendant be *still* married, she must plead in *person*, and not by attorney,

INCAPACITY TO CONTRACT, OR WANT OF FREE WILL.

To a declaration on a guarantee that the person for whom defendant became guarantee was *covert*, and therefore that there was no *legal debt* or *consideration* for defendant's promise. (*l*)

And for a further plea in this behalf the defendant saith that before and at the time when the said M. O. was supposed in and by the first count of the said declaration to have become indebted to the plaintiff, and from thence continually until the making of the said promise by the defendant as in the said declaration mentioned, the said M. O. was the wife of one L. O., which said L. O. at the time of the making of the said promise, and of the accruing of the said alleged debt to the plaintiff, and during all the time aforesaid, was the husband of the said M. O. and in full life; and this the defendant is ready to verify, &c.

Plea by husband to an action for goods delivered to his wife that she was then living in a state of adultery.

See form in *Hindly* v. *Marquis of Westmeath*, 6 Barn. & Cres. 200; but *semble*, the ground of defence would be admissible in evidence under the general issue; and see *Symes* v. *Goodfellow*, 4 Dowl. 642.

DURESS.

Plea that plaintiff *menaced* defendant's life, and thereupon he signed the agreement and made the promise through fear. (*m*)

And for a further plea the defendant saith that the plaintiff, just before and at the time of the defendant's making and signing the said agreement and making the said promise in the said declaration mentioned, unlawfully and with force and arms menaced and threatened the life of the defendant unless he the defendant would sign the said agreement and make the said promise in the said declaration mentioned. And the said defendant did thereupon then and by reason and in consequence of such menaces and threats, and in fear and apprehension thereof, and that the same would be immediately carried into execution, and to preserve his life, sign the said agreement and make the said promise in the said declaration mentioned; and this the defendant is ready to verify, &c.

FRAUD.

III. FRAUD.

Plea in assumpsit that plaintiff obtained the agreement and *defendant's promise* by fraud. (*n*)

And for a further plea in this behalf to the said first count the defendant saith that the plaintiff caused and procured the defendant to enter into the said agreement and promise as in the said first count alleged, and the defendant was induced to enter into and make the said agreement and promise

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ante, 14. In an action for use and occupation by the defendant's wife before marriage, the defendant cannot plead that she is not his wife, as such plea would amount to the general issue; 2 Chit. Rep. 642.

(*l*) This may be pleaded specially; 4 Bing, 470.

(*m*) See notes and other pleas in *debt*, *post*. *Semble*, that it would be better to show the facts and want of consideration more particularly when practicable. An agreement entered into under duress of *goods* is not void, and therefore cannot be defeated by a plea on that ground; *Skeate* v. *Beale*, 11 A. & E. 983; 3 P. & D. 597, S. C.

(*n*) Reg. Gen. Hil. T. 4 Will. 4, Pleadings in Assumpsit, No. 3, requires *fraud to be pleaded* in assumpsit. Thus, if a purchaser at an auction be sued, he must plead that there was puffing; 6 Car. & P. 671. So in assumpsit for timber bargained and sold, defendant cannot under non-assumpsit prove that he falsely represented the same; *Woodhouse* v. *Swift*, 7 Car. & P. 310. The full particulars or circumstances of the fraud need not be stated, but they may be pleaded as above. The reason assigned in 9 Coke Rep. 110, Plowd. 54 b, is, "because covin is secret, whereof by intendment another man cannot have knowledge." But in *Connop* v. *Holmes*, 2 Crom. M. & Ros. 720; 4 Dowl. 451; 1 Tyr. & Gran. 87, Parke, B., observed, "It is not clear that the authorities bear out that position to its full extent;" and see *Edwards*

through and *by means of the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him;* and this the defendant is ready to verify, &c. FRAUD.

Plea that defendant was induced to enter into the contract by the fraud of plaintiff, and that immediately on the discovery of the fraud *the defendant abandoned the contract,* and notified the same to the plaintiff, and gave up possession of the premises. (*n*)

And for a further plea in this behalf as to the sum of £20, parcel of the said sum of £100 in the declaration first mentioned, the defendant says that the defendant's promise in respect of the same, and whereupon the plaintiff hath above declared against him, was heretofore, to wit, on &c., obtained and procured by the plaintiff, and made by the defendant through the fraud, deceit, covin, and misrepresentation of the plaintiff. And the defendant further saith, that he the defendant, within a reasonable time next after the said fraud, covin, and misrepresentation came to his knowledge, to wit, on &c., rescinded and abandoned his said promise, and wholly ceased having any use or occupation of the said messuage and premises, together with the said furniture and effects and chattels of the plaintiff therein being, under the said promise, for and on account of the said fraud, deceit, covin, and misrepresentation, whereof the plaintiff then had notice; (*o*) and this the defendant is ready to verify, &c.

To assumpsit for not accepting a bill of exchange for the price of goods previously sold and for wool then sold, plea to the whole action that the plaintiff sold the wool with a warranty, which he broke, and the defendant returned the wool. (*p*)

And for a further plea in this behalf to the first count of the declaration the defendant says that at the time of the making of the agreement in the said first count of the declaration mentioned, to wit, on [&c.] in consideration that the defendant, at the request of the plaintiff, had promised the plaintiff to buy of him the said ten sheets of wool in the said first count mentioned, at and for the price therein also mentioned, he the plaintiff promised the defendant that the said ten sheets of wool were of the best Suffolk growth, and park fed; and that thereupon the defendant, confiding in the said promise of the plaintiff, did afterwards, to wit, on [&c.] buy of the plaintiff the said ten sheets of wool as and for such wool so agreed to be bought as aforesaid, and upon the terms aforesaid; and which the plaintiff then sold to the defendant as and for such wool as aforesaid; nevertheless although the plaintiff afterwards, to wit, on [&c.] delivered the said ten sheets of wool to the defendant, yet the plaintiff did not perform his said promise so by him made as aforesaid, but deceived and defrauded the de-

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... Brown, 1 Tyr. 196. It has been considered that a *general* plea is safer, as affording more latitude in proof; 9 Co. 110; 2 Maule & Sel. 378; *Took* v. *Tuck*, 4 Bing. 227; 9 Bar. & Cres. 444; and see forms in *debt, post.* And if the fraud be stated with *more particularity* than was necessary, yet the defendant will fail in case of variance, unless the judge will permit an amendment; *Took* v. *Tuck*, 4 Bing. 227; 9 Bar. & Cress, 444, S. C. Whatever allegation of fraud is stated must accord with the facts and evidence. Where the action was by an indorsee, and the fraud was committed by the drawer or a prior indorser, the plea should state such fact, and then show that the plaintiff took the bill with notice of the fraud, or without consideration, or after the bill was due, and from a person who had notice of the fraud; 3 Dowl. 400; 1 Hodges, 67, S. C.; 1 Crom. M. & Ros. 48; and see *Cossop* v. *Holmes*, 4 Dowl. 61; *Mason* v. *Ditchburn*, 1 Tyr. & Gran. 17, note; *D'Arundo* v. *Houston*, 6 Car & P. 511; a defective plea of fraud. See a plea of fraud in obtaining a note or bill, *Isaac* v. *Farrar*, 1 Tyr. & Gr. 281; 4 Dowl. 750, S. C.; and *post, Pleas in Actions on Bills or Notes.* As to what constitutes fraud so as to support the plea, see *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Moons* v. *Heyworth*, 10 M. & W. 147; *Wilson* v. *Fuller* (in error), 3 Q. B. Rep. 68. As to what amounts to fraud in law against a surety, see *Stone* v. *Compton*, 5 Bing. N. C. 142.

(*n*) This form actually occurred and it may assist; but either of the other forms would be preferable.

(*o*) This allegation seems essential, for a person should avoid deriving any partial benefit from a contract as soon as he has discovered the fraud; and see 3 Campb. 513, 514, note.

(*p*) The failure of a part of the consideration for the promise in this case affords a complete answer to the plaintiff's cause of action; *Head* v. *Baldrey*, 6 A. & E. 459.

FRAUD.

fendant in this, to wit, that the ten sheets of wool, and each and every of them, at the time of making the said promise of the plaintiff, and of the said sale and delivery to the defendant, were not of the best Suffolk growth and park fed; whereby the said ten sheets of wool, and each and every of them, became and were of no use or value to the defendant: and the defendant in fact says that afterwards, and within a reasonable time, to wit, within two days next after the delivery of the said wool as in the said first count mentioned, and as soon as he the defendant discovered that the same was not of the best Suffolk growth and park fed, he the defendant returned the said ten sheets of wool to the plaintiff for the cause aforesaid; and this the defendant is ready to verify, &c.

Plea to a declaration on a policy of assurance on a ship, that she was *not seaworthy*, and that the loss was attributable to that defect. (*p*)

And for a further plea in this behalf the defendants say that neither before nor at the time of the making of the said deeds-poll or policies of insurance in the said declaration mentioned, nor at any time after, nor at the time of the commencement of the said voyage in the said deeds-poll or policies of insurance mentioned, was the said ship or vessel seaworthy or fit or able safely to go or proceed on the said voyage in the said declaration mentioned, and that the loss of the said ship or vessel in the said declaration mentioned was and is justly and truly to be attributed to and was occasioned by the said ship or vessel *not being seaworthy* or in a fit or proper state to proceed or sail on her said voyage, and not by the perils and dangers of the seas, or by stormy and tempestuous weather, or the force and violence of the winds and waves, bulged, broken, damaged, sunk, or destroyed, or lost; and this the defendants are ready to verify, &c.

Plea that the policy was obtained by fraud and wrongful concealment of material information and misrepresentation.

And for a further plea in this behalf to the said —— counts, the defendants say that the said policies of insurance in those counts mentioned respectively were obtained from the defendants by the fraud, covin, wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by the misrepresentation of the plaintiff; wherefore the said defendants say that the said policies of insurance in the said declaration mentioned were and are void in law; and this the defendants are ready to verify, &c.

Another plea, stating the nature of the fraud and concealment. (*q*)

And for a further plea in this behalf the defendant says that he subscribed the said policy and made the said promise as in the declaration mentioned, after the said ship or vessel had sailed on the said voyage in the said policy mentioned, and that the said subscription and promise were obtained from him the defendant by the fraud, falsehood and misrepresentation of the plaintiffs, to wit, as to and concerning the time of sailing of the said ship or vessel, and the time of sending and dispatching of the order to insure the said oil in the said policy mentioned, and by the fraudulent concealment from the defendant by the plaintiffs of certain facts and information which

(*p*) As to the want of seaworthiness and proof, *Franco* v. *Natusch*, 1 Tyr. & Gr. 401. See pleas to an action for breach of a charter-party of affreightment alleging the vessel was overladen, &c., denying such overlading, and other pleas, *Gould* v. *Oliver*, 2 M. & G. 213. See also *Sadler* v. *Dixon*, 8 M. & W. 895. If the declaration contain an allegation that the vessel was seaworthy, of course it will be sufficient to traverse the same and conclude to the country.

(*q*) *Mackintosh* v. *Marshall*, 11 M. & W. 116.

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before and at the time of procuring the said policy and subscription were known to the plaintiffs, and were then material to be known by and ought then to have been communicated to the defendant, to wit, amongst other things, as to and concerning the time of sailing of the said vessel, and as to and concerning the said voyage in the said policy mentioned; and this the defendant is ready to verify, &c.

Plea, that plaintiff had received a letter containing certain material information relative to the ship, but plaintiff wrongfully concealed such information from the defendant.

And for a further plea in this behalf, the defendants further say that before the making or executing by the defendants of the said respective policies, to wit, on the —— day of —— A. D. —— aforesaid, the plaintiff had received a certain letter and communication, dated in parts beyond the seas, heretofore, to wit, on the 23d day of July in the year aforesaid, and containing certain material information of and concerning and relating to the said ship or vessel, to wit, that the said ship or vessel had had a leak, which had been stopped, whereof the plaintiff before and at the time of the making and executing of the said policies of insurance had notice, and thereupon, afterwards, to wit, on the said 11th day of September, in the year aforesaid, it became and was the duty of the plaintiff, before the making or executing of the said policies of insurance, or either of them, to give the defendants notice of such material information of and concerning and relating to the said ship or vessel. Nevertheless, the plaintiff, not regarding his duty in that behalf, *did* not nor would before the making or executing of the said policies of insurance, or either of them, give the defendants or either of them notice of such material information, but then, and continually until and after the said policies had been so made as aforesaid, wrongfully, unjustly, and unlawfully withheld and concealed such information from the said defendants, and they made and executed the said policies when wholly ignorant thereof; whereby and on account of such wrongful and fraudulent concealment the said policies then became and were and still are wholly void; and this the defendants are ready to verify, &c.

Plea to declaration on a *life* policy *misrepresentation* of state of health of the life insured. (r)

And as to the said first count of the said declaration the defendant says that the said declaration in the said policy mentioned, referred to in the said declaration in this cause mentioned, did not contain a true and faithful representation of facts according to the true intent and meaning of the said policy, but on the contrary thereof contained an untrue and unfaithful representation of the facts in this, to wit, that he the said T. B., at the time of the making of the said declaration in the said policy mentioned and referred to, was not in a sound and perfect state of body, but on the contrary thereof the said T. B. theretofore, and for a long time, to wit, for twenty years, previously to the time of making the said declaration, had been, and then was, predisposed to a disease tending to shorten life; and this the defendant is ready to verify, &c.

Plea, that the third person was *afflicted with disease.*

And for a further plea in this behalf, as to the said first count of the said declaration, the defendant says that the said declaration in the said policy mentioned and referred to, and in the said declaration in this cause men-

(r) As to pleading fraud, *Connop* v. *Holmes*, 2 Com. M. & Ros. 726, note (a); 1 Tyr. & Gr. 77; *D'Arcuda* v. *Houston*, 6 Car. & P. 511; *Edwards* v. *Brown*, 3 Y. & J. 423; 1 Tyrw. Rep. 196.

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tioned, did not contain a true and faithful representation of the facts according to the true intent and meaning of the said policy, but on the contrary thereof contained an untrue and unfaithful representation of the facts in this, to wit, that he the said T. B. at the time of the making of the said declaration in the said policy mentioned and referred to, was not in a sound and perfect state of body, but on the contrary thereof, the said T. B. theretofore and for a long time, to wit, for twenty years, previous to the time of making that declaration, had been and then was afflicted with a disease tending to shorten life; and this the defendant is ready to verify, &c.

Plea that the third person was afflicted with *symptoms of disease, &c.*

Another plea was here inserted like the last, inserting the words "symptoms of a disease tending to shorten life."

Plea that the plaintiff caused to be delivered a document as signed by his medical attendant, when it was not so.

And for a further plea in this behalf, as to the said first count of the said declaration, the defendant says that before the granting of the said insurance, and making of the said policy in the said declaration mentioned, to wit, on the 22d day of January, A. D. 1833, the said E. I. Company caused to be delivered to the plaintiff a certain document, being one of the documents mentioned and referred to in the said policy, containing divers matters therein to be signed by the medical attendant of the said T. B. before the said Company would make the said policy. And defendant says, that thereupon the said document, with the matters therein, were afterwards, to wit, on the day and year last aforesaid, delivered by the said plaintiff to the said Company, signed by one G. R. as and for the medical attendant of the said T. B., and being one of the documents in the said policy mentioned and referred to. And the defendant further says, that the said Company and the defendant, confiding in the authenticity of the said document, and believing the same was signed by the medical attendant of the said T. B. as aforesaid, the defendant made the said policy in the said declaration mentioned, whereas in truth and in fact at the time of the said G. R. signing the said document and the matters therein contained as aforesaid, the said G. R. was not the medical attendant of the said T. B. according to the true intent and meaning of the said policy, wherefore the said policy was and is wholly void; and this the defendant is ready to verify, &c.

4. DENIALS OF INDUCEMENT OR ALLEGATIONS IN DECLARATION.

DENIAL OF ANY MATERIAL ALLEGATION IN THE DECLARATION.

Observations.] We have in the first volume, p. 277, given the form of a special count in assumpsit, stating what is termed, 1*st*, an *Inducement* of explanatory matter; 2*dly*, the *Consideration*; 3*dly*, the *Promise*; 4*thly*, the usual *Averments* of the *Plaintiff's Performance* of a *Condition Precedent*, or of a *Request* or *Notice*; 5*thly*, the *Breach*; and 6*thly*, the statement of *Damages*. Whenever the statement of an inducement, or of either of the above matters, is material to the support of the action, the defendant may traverse *i. e.* deny such statement. According to the general rules of pleading, and respecting traverses considered in the first volume, care must be observed in any such plea in denial to put in issue only what is material to the support of the action, and when proof of one of several allegations would suffice

to sustain the action, that then the traverse should be so pleaded as to put in issue each separately or disjunctively, and not conjunctively. Such a plea in denial, not introductory of any new matter which the plaintiff should have an opportunity of answering, should always conclude to the country. See Reg. Gen. Hil. T. 4 W. 4, reg. 13, which orders, that "all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country." Such a plea may be readily framed by any practitioner, and must always vary according to the particular allegations in the declaration. Several forms will be referred to and given under the heads of pleas in particular actions in most frequent use, such as pleas denying the making, indorsing, or presentment of a bill or note; the denial of bankruptcy, or denial that the plaintiffs are assignees, &c.

DENIALS OF INDUCEMENT OR ALLEGATIONS IN DECLARATION.

With respect to an averment or statement of damages in a special count in assumpsit, there is no admissible distinct plea traversing such damages, and therefore the plea must be to some other part of the count.

And for a further plea in this behalf to the said first count, the defendant saith, that the defendant [*or* "the said E. F."] was not, at the time of the making of the said promise in the said first count mentioned, indebted to the plaintiff as in that count alleged; and of this the defendant puts himself upon the country, &c.

Plea, *denying inducement* that the third person was indebted as stated in a declaration on defendant's guarantee or to a declaration on a contract in consideration of forbearance. (*q*)

Denial or traverse in an action by assignees of bankrupt of the party being a bankrupt, &c., *post*.

Several other precedents of *denials* or *traverses*.

Denial or traverse that plaintiffs are assignees, Reg. Gen. Hil. T. 4 W 4, r. 21; *Scott* v. *Thomas*, 6 Car. & P. 611; and *post*.

See *Hindly* v. *Marquis of Westmeath*, 6 Barn. & Cress. 200; *Symes* v. *Goodfellow*, 4 Dowl. 642.

Special denial of legal liability from which promise of husband implied, viz. by pleading *adultery* of wife.

And for a further plea in this behalf, the defendant says that he the said defendant did not become tenant of the premises in the declaration mentioned, nor occupy the same upon the terms therein alleged; and of this the defendant puts himself upon the country, &c.

To assumpsit by landlord against tenant for not repairing according to agreement, plea that the defendant did not become tenant on the terms stated. (*r*)

5. No Consideration.

It is unnecessary to plead to a count in indebitatus assumpsit that there was no consideration for the promise, as the general plea of non-assumpsit

DENIAL OF CONSIDERATION. (*s*)

(*q*) To a declaration on a guarantee for the faithful services of the plaintiff's "traveller," alleging that the traveller had received goods and money, and had not accounted, see plea denying the receipt of the goods and money, *Norton* v. *Powell*, 4 M. & G. 42.

(*r*) *Beech* v. *White*, 4 P. & D. 399; see also *Hallifax* v. *Chambers*, 4 M. & W. 662. This plea may be pleaded with non-assumpsit, *Brydges* v. *Lewis*, 2 G. & D. 763; and see that case as to the advantage of pleading the latter plea in addition.

(*s*) 1 Mood. & R. 379.

DENIAL OF CONSIDERATION.

sufficiently compels the plaintiff to prove the consideration, viz. the pre-existing debt, whether goods sold, work done, money lent, paid, had and received, or any other debt, and all other circumstances, in order to prove the promise, which is usually only implied from such premises; (Reg. Gen. Hil. T. 4 W 4, I. In Assumpsit, reg. 1; and *Passenger* v. *Spokes*, 1 Bingh. N. C. 587; 1 Scott, 560, S. C.; Roscoe's Tracts, 11, 15, 17, 19, 22, 23, 30.) But as respects any special count in assumpsit, where the consideration has been stated by way of inducement, it has been supposed that the mere plea that the defendant did not promise would only put in issue the fact of the promise, and not such previous inducement of the consideration, and therefore that to such a count there should be a plea particularly denying the consideration as stated in the declaration; (*Id. ibid.*; Roscoe's Tracts, 32.) The necessity for this is however questionable.

Form of plea *denying the alleged consideration* as stated in a special count.(*t*)

And for a further plea in this behalf to the said first count, the defendant saith, [*here traverse the words of the declaration, the facts which constituted the alleged consideration,*] as therein alleged, or any part thereof; and of this the defendant puts himself upon the country, &c.

ILLEGALITY.

6. ILLEGALITY OF CONTRACT OR CONSIDERATION.

Illegality of consideration *must* be pleaded.

Observations.] The pleading Reg. Gen. Hil. T. 4 W. 4, expressly require *illegality* either *by statute* or *at common law* to be pleaded; and this not only where the express contract on which a plaintiff sues is illegal, but also where illegal services *having been performed*, no contract to pay for them can be *implied*; (*Potts* v. *Sparrow*, 1 Bingh. N. C. 594; 3 Dowl. 630.) It seems therefore that *illegality* must be pleaded as well to an *indebitatus count* as to a *special* count. Thus *maintenance* (an illegality at common law) must be pleaded to indebitatus assumpsit by an attorney on his bill of costs; *Id. ibid.* And a defendant cannot take advantage of an illegality to avoid a contract without an appropriate special plea, though the illegality becomes apparent in the course of the plaintiff's case, and without any evidence being offered by the defendant. *Fenwick* v. *Laycock*, 1 G. & D. 27.

ILLEGALITY AT COMMON LAW.

Plea to action on promissory note, that it was given in consideration of plaintiff's withdrawing his opposition to the discharge of a party under the Insolvent Act. (*u*)

And for a further plea in this behalf to the first count of the said declaration the defendant saith, that before the making of the said promissory note in that count mentioned by the defendant, to wit, on &c., one J. C. H. was indebted to the plaintiff in a large sum, to wit, £25, and to divers other

(*t*) In an action on a bill of exchange or promissory note, the want of consideration *must* be *specially* and *circumstantially* pleaded, and *all the facts*, showing *particularly* the precise circumstance, must be pleaded. See a form in *Lowe* v. *Burrows*, 1 Harr. & Woll. 12; and see *Pleas to Actions on Bills, post.* Where the subsisting contract between the parties is made up of two or more agreements entered into at different periods, the defendant cannot plead a want of consideration as to one only of such agreements, for though it would be a good answer by way of plea to deny the existence of any consideration for the promise on which an action is brought, yet it can be none to deny such consideration as to one particular part of the transaction, or one single step or link out of many, from all which taken together the promise is inferred. As if a promise laid in a declaration is to be inferred from a long correspondence between merchants which is set forth upon the face of the declaration, it would be no plea to select one of the letters singly, and to plead that no consideration existed for that particular letter; *Home* v. *Booth*, 3 M. & G. 709, 742; 4 Scott, N. R. 526, S. C.

(*u*) See another plea in *Warner* v. *Haines*, 6 Car. & P. 666, 667; and forms in *Davis* v. *Holding*, 1 Tyr. & Gr. 371; 1 M. & W.

persons *in* divers other sums of money, and being so indebted and being a prisoner *in* actual custody within the walls of a certain prison in that part of the United Kingdom called England, to wit, in the prison of ——, upon process, at the suit of one H. E., for the recovery of a certain debt then due from the said J. C. H. to the said H. E., did within fourteen days next after the commencement of the said actual custody of the said J. C. H., to wit, on &c., duly and according to the directions and provisions of the statute made and passed in the second year of the reign of her present Majesty, apply by petition in a summary way to the Court for Relief of Insolvent Debtors, in the said act mentioned, for his discharge from custody as aforesaid, according to the provisions of the said act, (*x*) which said petition was subscribed by the said J. C. H. and forthwith filed in the said Court, and the estate of the said J. C. H. was afterwards, to wit, on &c., by an order made under the said act vested in the provisional assignee of the said Court for Relief of Insolvent Debtors; and the said J. C. H. did afterwards, and within fourteen days next after such last-mentioned order was made, to wit, on &c., deliver into the said Court a schedule of his debts and property, effects and other matters, (*x*) according to the said statute, and in which schedule there was a full and true description of the said debt due and owing from him to the plaintiff, and the said J. C. H. then subscribed the said schedule, and forthwith filed the same in the said Court, and thereupon the said Court did then appoint the —— day of ——, A. D. ——, at the said Court, to be held at ——, for the said prisoner to be brought up before such Court to be dealt with according to the provisions of the said act, and the plaintiff before and at the time of the making of the said promissory note had notice of the premises aforesaid, and so continuing such creditor as aforesaid had threatened to oppose, and intended and was about to oppose the said J. C. H.'s discharge so petitioned for as aforesaid; and thereupon heretofore, and before the hearing of the said petition, to wit, on &c., it was agreed between the plaintiff and the defendant that the plaintiff should not oppose the said J. C. H.'s discharge so petitioned for as aforesaid, and that in consideration thereof the defendant should make and deliver to the plaintiff a promissory note of the same tenor and effect as in the said declaration mentioned, and that thereupon, in pursuance of the said agreement, the defendant, in consideration that the plaintiff would not oppose the said J. C. H.'s discharge so petitioned for as aforesaid, did then make and deliver to the plaintiff the said promissory note in the said first count mentioned; and the plaintiff accordingly did not then or afterwards oppose the said petition of the said J. C. H. And the defendant further saith, that the said J. C. H. afterwards, and after the making of the said promissory note, to wit, on &c., by a certain order then made by the said Court for the Relief of Insolvent Debtors, he the said J. C. H. then being an insolvent debtor and a prisoner in custody as aforesaid, was duly discharged according to the said statute of and from the said debt, in respect whereof the said

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159, S. C.; and *post*. See plea of an illegal agreement to abandon petition against the return of a member of parliament, *Coppock* v. *Bower*, 4 M. & W. 361. The statement of the proceedings under the Insolvent Act should of course be according to the facts of the case.

(*x*) *Quære* as to the necessity of alleging that the petition stated all things required to be stated by the 1 & 2 Vict. c. 110, s. 35, and that the schedule contained all things required by the 69th section.

ILLEGALITY AT COMMON LAW.

J. C. H. was so indebted to the plaintiff as aforesaid; (*y*) and this he the defendant is ready to verify, &c.

Plea that the bill was accepted by the defendant to induce plaintiff to consent to his discharge under the Insolvent Act.

And for a further plea in this behalf to the first count of the declaration, the defendant says, that before the making of the said bill of exchange in that count mentioned by the said A. B., and the acceptance thereof by the defendant, he the defendant was indebted to the said A. B. in a large sum, to wit, £——, and to divers other persons in divers other sums of money; and being a prisoner in actual custody, &c. [*here state the application to be discharged, the vesting order, the delivery and filing of the schedule, and the appointment of a time for the hearing, as in the last plea,*] whereof the said A. B. had notice, and then threatened the defendant to oppose his discharge, unless the said defendant would accept a certain bill of exchange for the amount of the said debt so due to the said A. B.: and thereupon, to wit, on &c., in order to induce the said A. B. to abandon his said threat, and not to oppose the said discharge of him, the defendant did then accept the said bill of exchange in the said first count of the declaration mentioned, whereof the plaintiff, before the said bill of exchange was so indorsed to him as aforesaid, and before he had any right, title or interest in or to the said bill, had notice. And the defendant further saith, that he the defendant afterwards, and after the accepting of the said bill of exchange in the said first count mentioned as aforesaid, to wit, on &c., by a certain order made by the said Court for the Relief of Insolvent Debtors in England, held at ——, (he the defendant then being a prisoner in custody as aforesaid,) was duly discharged according to the said statute of and from the said debt, and in respect whereof he the defendant had accepted the said bill of exchange; (*y*) and the defendant avers that the said discharge still remains in full force and effect; and this the defendant is ready to verify, &c.

To action on promissory notes, plea that the plaintiff, before signing a composition deed, by which the creditors of the defendants agreed to take bills at a long date for their debts, stipulated in fraud of the other creditors that the defendants should indorse bills to the plaintiff to induce him to sign the deed of composition, and averment of such indorsement of bill, and de-

And for a further plea in this behalf, the defendants say, that before the making of the promissory notes in the declaration mentioned, to wit, on &c., the defendants were indebted to the plaintiff and divers other persons in divers sums of money, which they the said defendants were then unable to pay without making sale of their estate and effects, to the great prejudice of the trade of them the said defendants, and thereupon, for the satisfaction of the plaintiff and the other creditors of the defendants, they the defendants then proposed to the plaintiff and the other creditors to pay the respective amounts due to them in manner and at the times hereinafter mentioned, provided they the said plaintiff and the said other creditors would permit the defendants to pursue their said trade without molestation, that is to say, the sum of 5*s.* in the pound, to be paid on the execution of articles of agreement between the defendants and the plaintiff and the other creditors, to be prepared for the purpose of carrying the said proposition into effect, by promissory notes at two months, with a satisfactory security for the due payment thereof; and the remaining sum of 15*s.* in the pound to be paid by the defendants' own notes by three equal instalments, at six, nine, and twelve

(*y*) This latter averment as to the party having been actually discharged under the act seems not to be necessary.

months from the date thereof, which said proposition the plaintiff and the other creditors then agreed to, and the plaintiff and the said other creditors then mutually, at each others request, agreed with each other and with the defendants, in consideration of the premises and of such mutual agreement as aforesaid, to accept their respective debts to be paid in manner aforesaid, and to execute articles of agreement as aforesaid, to be prepared within a reasonable time, for the purpose of carrying the said proposition into effect. And the defendants further say that afterwards, and within a reasonable time, to wit, on &c., in pursuance of the said proposition and agreement, and in order to carry the said proposition into effect, certain articles of agreement between the defendants and the plaintiff and the other creditors were duly prepared, and executed by the plaintiff and the said other creditors, the said creditors then relying on the said mutual agreement, which articles &c. [*make profert of the articles sealed by the plaintiff and the said other creditors*], whereby the plaintiff and the said other creditors agree to accept payment of their respective debts in manner aforesaid, and in consideration thereof severally granted to the defendants full liberty and licence to attend to their trade and business, and to transact any affairs, matters or things whatsoever, at any place within the United Kingdom, at their free will and pleasure, and without any let, suit or molestation by the plaintiff or the said other creditors, or any of them, for the space of twelve calendar months from the day of the date thereof. And the defendants further say, that before and at the time of the making of the said proposal and agreement to and with the plaintiff and the said other creditors, to wit, on the day and year first aforesaid, it was unlawfully and fraudulently agreed between the plaintiff and the defendants, without the knowledge or consent and in fraud of the said other creditors, that the defendants should indorse a certain bill of exchange to the plaintiff, to wit, a bill drawn by the defendants upon and accepted by J. and G. B., for the payment of £76 12*s.*, in fraud of the other creditors, and in order to give the plaintiff a fraudulent preference beyond the said other creditors, and to induce him to execute the said articles of agreement. And the defendants further say, that they the said defendants did afterwards, to wit, on the day and year last aforesaid, in pursuance of the said fraudulent agreement between the plaintiff and the defendants, and in fraud of the said other creditors, and for the purpose last aforesaid, indorse the said last mentioned bill of exchange, and deliver the same to the plaintiff, and did also make and deliver the said three promissory notes in the declaration mentioned, the sums mentioned in the said notes amounting together to the sum in which the defendants were indebted to the plaintiff as aforesaid in the proportion of 15*s.* in the pound; and this the defendants are ready to verify, &c.

Delivery of the promissory notes mentioned in the declaration, the latter amounting to the sum due to the plaintiff under the composition.(*a*)

See a plea holden defective, but which might be readily altered into a sufficient plea, *Pelleoat* v. *Angel*, 2 Crom. Mee. & Ros. 311.

Plea of a smuggling consideration for a bill.

(*a*) The plaintiff could not recover upon the promissory notes for the amount of the composition money, even although he had received nothing on the bill indorsed to him by the defendants in fraud of the other creditors; *Bowden* v. *Haigh*, 11 A. & E. 1033; 3 P. & D. 661, S. C. But if the defendants had voluntarily paid the indorsed bill, they could not recover the amount back from the plaintiff as money had and received; see *Wilson* v. *Ray*, 10 A. & E. 82; 2 P. & D. 255, S. C.; but otherwise if he were compelled to pay the amount of the bill at maturity to bonâ fide indorsees for value; *Bradshaw* v. *Bradshaw*, 9 M. & W. 29.

ILLEGALITY BY STATUTE.

Observations on Pleas of Illegality under Statutes.] The statute 5 & 6 Will. 4, c. 41, materially alters the law and form of *pleading* certain illegalities, as *usury*, *gaming*, or contracts, or securities, in consideration of a party's consenting to sign a bankrupt's certificate, and certain other illegal transactions *declared void* by several statutes, and enacts that these statutes, so far as they declared bills and notes and other securities void, shall be repealed, and the security *shall merely be deemed to have been given on an illegal consideration;* but that when the party to the bill has paid the holder, he may recover the amount from the person to whom the bill was given on such illegal consideration. The effect of this enactment is, that the *contract* is equally illegal and void between the *original* parties to it, and may be *so pleaded,* but the *security* is valid in the hands of a *bonâ fide holder;* and it would seem that if a holder took the bill or note founded on any illegal consideration, with notice of the illegality, or without giving a consideration, or after it was due, a plea *averring either of those facts* would be an answer to the action of such indorsee. In *Pellecat* v. *Angel*, 1 Gale, 187, the plea stated that the consideration of a bill was the sale between plaintiff and defendant of goods abroad to an Englishman, as the plaintiff well knew, at a small price, less than their real value, for the purpose of the defendant getting them smuggled into England, and it was holden bad, because it did *not show any participation by the* plaintiff in the illegal purpose of the defendant, and that therefore the plaintiff was entitled to recover. In a plea of illegality, after stating the illegal consideration, it is not necessary to aver that there was no other consideration, *Davis* v. *Holding*, 1 M. & W. 159. See observations on this case, 3 P. & D. 419, 420.

In pleas of illegality to a declaration on a bill or note, or other security, it has been most usual to aver that the illegal contract was "*contrary to the statute in such case made and provided,*" so as by express words as well as by description of facts to show that the case was within the enactment, but this is not absolutely necessary in a *plea; Peate* v. *Dicken*, 1 Crom. M. & Ros. 422; 3 Dowl. 171; 5 Tyr. 117. It was also the practice in pleas of illegality declared by statute to render *void* the security, as in case of usury or gaming, to conclude the plea "whereby and by force of the statute in that case made and provided the said bill was and is *void* in law." But in cases within the 5 & 6 Will. 4, c. 41, which now declares that the *security* shall not be deemed *void*, that averment should be omitted, or at least it is is not necessary.

Many of the statutes relating to illegality of consideration or contract, as the 12 Ann. c. 16, against *usury*, and 9 Ann. c. 14, as to *gaming*, enact, that all notes, bills, and securities, given to secure the payment, shall be *utterly void;* and, therefore, *formerly* it was sufficient to plead the illegality, and to leave even an *indorsee to reply any matter*, if he could, showing that he was a bonâ fide holder without notice of the usury, and therefore entitled to recover as under 58 Geo. 3, c. 93; but the act 5 & 6 Will. 4, c. 41, s. 1, enacts, that securities given for such illegal considerations or contracts shall not be *void*, but shall be deemed to have been given for an illegal con-

ILLEGALITY BY STATUTE.

sideration, the effect of which enactment is, that as between the *original parties* they cannot recover; but that if the declaration be at the suit of an indorsee, not apparently party to the original illegality, it would be *safer*, if not necessary, in pleading usury or gaming, since this last act, to aver either in the plea that the plaintiff had given no consideration, or had notice of the illegality at the time he received the bill, or that he received it after it was due, as in the following precedent.

To action by indorsee against drawer of a bill, that the bill was given to secure the performance of an *usurious* contract between the acceptor and a third person. (*b*)

And for a further plea in this behalf to the first count of the declaration, the defendant saith, that before the making of the said bill of exchange in the said first count mentioned, to wit, on &c. [*any day about the time,*] it was corruptly, and against the form of the statute in such case made and provided, (*c*) agreed by and between the said E. F. [*the acceptor,*] and one G. H. that he the said G. H. [*here state the usurious agreement, which in this particular case was thus:*] should lend and advance to the said E. F. a certain sum of money, to wit, the sum of £750, in manner following, that is to say, part thereof, to wit, £250 on the day and year last aforesaid, and the residue thereof, to wit, £500, at a certain time, to wit, on the —— day of —— then next, and that he the said G. H. should forbear and give day of payment of the sums of £250 and £500 from the times of lending and advancing the same, until and upon a certain other time, to wit, the —— day of ——, A. D. ——, (*d*) and that for the forbearing and giving day of payment of the said sums of £250 and £500 as aforesaid, the said E. F. should give and pay to the said G. H. a certain sum of money, to wit, the sum of £250 of like lawful money, and that for securing the re-payment of the said sums of £250 and £500, so to be lent and advanced as aforesaid, together with the said further sum of £250 on the said —— day of —— in the year last aforesaid, the said defendant should make, and draw and indorse, and the said E. F. should accept the said bill of exchange for £1000 in the said [first] count mentioned, payable at a period exceeding twelve months after the date thereof, to wit, at eighteen months after the date thereof, and that the said E. F. should deliver the same to the said G. H. And the defendant further saith, that in pursuance and in part performance of the said corrupt

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(*b*) See other forms, 1 Harr. & Woll. 12; Petersdorff's Prec. 110. The defence of usury might, before Reg. Gen. Hil. T. 4 W. 4, have been given in evidence in assumpsit or debt on simple contract, under the general issue, 1 Stra. 498; Com. Dig. Plead. 2 (G. 7); 1 Saund. 295 b. n.; but it was frequently advisable to plead the usury specially; and now such defence or other *illegal* consideration or contract must be so pleaded. When pleaded, the usurious contract must be set forth *particularly*, and a general plea of usury is bad on demurrer; 2 M. & Sel. 377; 3 Bing. N. C. 396. A *variance* between the statement in the plea and the evidence, with respect to the usurious contract, would be fatal, 1 Saund. 295, n.; 3 T. R. 538; 1 Taunt. 511; and see the notes, *ante*, vol. ii. 359; and the form of plea in debt on bond and notes, *post*; see the replication to the above plea, *post*; and in 1 Har. & Woll. 12. By 2 & 3 Vict. c. 37, s. 1, (extended by 4 & 5 Vict. c. 54, and 6 & 7 Vict. c. 45, to the first of January, 1846,) bills of exchange and promissory notes payable at or within twelve months from their date, and all contracts for the loan or forbearance of money above £10 are exempted from the usury laws. It is to be observed that the act does not extend to the loan or forbearance of money on security of land, tenements, or hereditaments, or any estate or interest therein; see *Doe* d. *Haughton* v. *King*, 11 M. & W. 333; *Holt* v. *Miers*, 5 M. & W. 168; *Turquand* v. *Mosedon*, 7 M. & W. 504.

(*c*) *Quære*, if in any case necessary in *a plea* of *illegality* to state that the bargain was contrary to the statute; see *Peale* v. *Dicken*, 1 Crom. M. & Ros. 422; 3 Dowl. 171; 5 Tyr. 117.

(*d*) The time is material and should be stated accurately; *Fox* v. *Keeling*, 2 Ad. & El. 670; *Robson* v. *Fallows*, 3 Bing. N. C. 396.

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and unlawful agreement, he the defendant afterwards, to wit, on &c., made, drew, and indorsed, and the said E. F. then accepted the said bill of exchange, and the said E. F. then delivered the said bill of exchange so made, indorsed, accepted, and made payable as aforesaid, to the said G. H. on the terms aforesaid, and that in further pursuance of the said corrupt and unlawful agreement, the said G. H. afterwards, to wit, on the day and year last aforesaid, did lend and advance to the said E. F. the sum of £250, part of the said sum of £750; and afterwards, to wit, on the —— day of ——, in the year —— aforesaid, did lend and advance to the said E. F. the said further sum of £500; and the defendant further saith, that the said sum of £250, so agreed to be given and paid by the said E. F. to the said G. H. for such loan and forbearance as aforesaid, and so secured as aforesaid, exceeds the rate of £5 for the forbearing of £100 for a year, contrary to the statute in such case made and provided. (*d*) And the defendant further saith, that the said plaintiff afterwards, to wit, on &c. first became and was the indorsee and holder of the said bill of exchange, he then and before having full notice and knowledge that the said bill had been and was so drawn, indorsed, and accepted on such consideration and terms as aforesaid, and upon and in pursuance of the said corrupt and unlawful contract, and for the purpose aforesaid; (*f*) and this the defendant is ready to verify, &c.

Averment, that when plaintiff became the holder, he had notice of the illegality. (*e*)

Bill or note void for *gaming consideration*, contrary to 9 Ann. c. 14, s. 1, action by drawer or payee against acceptor or maker. (*g*)

And for a further plea in this behalf the defendant says, that the consideration for the said bill [*or* "note"] in the declaration mentioned, was at the time of the accepting [*or* "making"] of the said bill [*or* "note,"] money, to wit, £——, *won by the plaintiff* of the defendant, on the said day when the said bill [*or* "note"] was so made, as in the declaration mentioned, by *gaming* and playing at cards, to wit, the game of whist, [*or* "dice," *or* "by betting," &c. *see words of 9 Ann. c. 14, s. 1,*] contrary to the statute in that case made and provided. And that he the defendant had not, at the time of the accepting [*or* "making"] of the said bill [*or* "note"] as in the declaration mentioned, in his hands any effects of the plaintiff, nor had he received from the plaintiff any legal or sufficient consideration for the acceptance [*or* "making"] of the said bill [*or* "note,"] contrary to the form of the statute in such case made and provided; (*h*) and this he the defendant is ready to verify, &c.

(*d*) Whenever a statute declares a transaction illegal, if it be so pleaded, it is advisable to state that it was contrary to the statute; 1 Crom. M. & Ros. 422. The forms used also to add, "whereby and by force of the statute in such case made and provided the said bill of exchange was and is wholly void." But as 5 & 6 Will. 4, c. 41, now enacts that the security should not be deemed void, but only deemed to have been on an illegal consideration, that allegation should be omitted.

(*e*) See necessity for this averment since 5 & 6 Will. 4, c. 41, *supra*, note (*c*).

(*f*) If the plaintiff gave no consideration, aver that fact, as in 1 Bing. N. C. 641.

(*g*) As to the necessary averments to be introduced into a plea when the action is by an *indorsee*, see *Humphreys* v. *Earl of Waldegrave*, 6 M. & W. 622; see another plea of gaming consideration, 1 Bing. N. C. 266; 5 Moore & Scott, 102; 3 Dowl. 133. It is submitted that the above form is *not* well framed, and that it would be better first to state the illegal contract contrary to the statute in such case made and provided, and the same as in a declaration for the penalty, or as in a plea of usury, as *ante*, 45; and afterwards to aver that the bill or note, or contract, was made in pursuance of such illegal contract, and in payment or in satisfaction thereof As to what are illegal games within this statute, see *Dainstree* v. *Hutchinson*, 10 M. & W. 85.

(*h*) The averment that used to be here inserted, "by means whereof and by force of the said statute the said bill or note was and is wholly void in law," is, since 5 & 6 W. 4, c. 41, to be omitted, see note (*d*) *supra*.

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And for a further plea in this behalf the defendant says, that the said bill of exchange [*or* "promissory note,"] in the said declaration mentioned, was accepted [*or* "made"] for certain money before the accepting [*or* "making"] thereof, to wit, on &c. lost by the said defendant to the said plaintiff, *and by the said plaintiff then won* of the said defendant by playing with dice at a certain unlawful game, commonly called or known by the name of [hazard,](*k*) contrary to the form of the statute in such case made and provided; and this the defendant is ready to verify, &c.

By maker of note or the acceptor of bill to declaration by payee or drawer, that bill or note was given for gaming debt.(*i*)

And as to the second and third counts of the declaration, the defendant says that the said sum of £30 in the second count mentioned was borrowed by the defendant as the plaintiff then well knew, and was knowingly lent by the plaintiff to the defendant in a certain common gambling room in and parcel of a certain messuage and premises, for the purpose of the defendant's illegally playing and gaming therewith, at and in the said gambling room, at a certain illegal game, to wit, the game of hazard, contrary to the statute in such case made and provided; and that the account in the last count mentioned was had and stated of and concerning the said sum of £30 in the second count mentioned, also borrowed and lent as aforesaid, and for and in respect of no other debts or monies whatever; and this the defendant is ready to verify, &c.

To assumpsit for money lent, plea that it was lent for the purpose of playing at an illegal game. (*l*)

See the plea and replication in *Boulton* v. *Coghlan*, 1 Bingh. N. C. 640; and 1 Tyrw. 446.

Plea that promissory note was for money lost at play.

And for a further plea in this behalf to the first count of the declaration, the defendant says, that a part of the consideration for the making by him the defendant of the said note in that count mentioned, to wit, the sum of £2000, parcel of the said sum of £2770 in the said note mentioned, was for a certain large sum of money, exceeding the amount of £10, to wit, the said sum of £2000, *won by the said* ——, in his lifetime, from the defendant by gaming, that is to say, *by betting* to a large amount, to wit, the said sum of £2000, upon a certain horse-race, to wit, the St. Leger Stakes, at the races held upon the Doncaster Race Course, to wit, on &c. the said defendant then betting with the said A. in his lifetime that a certain horse, to wit, a horse called Fang, would win the said race, and that if the said horse did not win the said race, he the defendant would pay to the said X. a certain sum, to wit, the said sum of £2000, but if the said horse did win the said race, the said X. should pay to the defendant a certain sum, to wit, the sum of £600, and the defendant avers that the horse

Plea, that the note was given to secure a wager lost by *betting* on a horse race.

(*i*) See another form in Petersdorff's Prec. 109; observe the note in last precedent, and 5 & 6 Will. 4, c. 41.

(*k*) The words "at one time and sitting" have been *unnecessarily* inserted in several modern forms, but on examination of 9 Ann. c. 14, and the cases, it will be found they should be omitted.

(*l*) Money lent for the purpose of gaming, and of playing with at an *illegal* game, such as hazard, cannot be recovered back, *M'Kinnell* v. *Robinson*, 3 M. & W. 434; and it also seems that money lent for the purpose of gaming, within the 1st section of 9 Ann. c. 14, cannot be recovered; and this is a distinct defence from a plea that the money was lost at play, being founded on distinct clauses in the 1st section of 9 Ann. c. 14; *Temple* v. *Keily*, 1 M. & G. 904.

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did not win the said race, whereupon the defendant afterwards, to wit, on the &c. for the purpose of paying to the said X. amongst other monies the said sum of £2000, parcel of the said sum of £2770 in the declaration mentioned, made and drew the said promissory note in the said first count mentioned, and delivered the same to the said X. in his lifetime, contrary to the form of the statute in such case made and provided; and this the defendant is ready to verify, &c.

Plea, that promissory note was given for money lost by playing at hazard. (*m*)

And for a further plea in this behalf as to the first count in the said declaration, the defendant says, that before the making of the promissory note by the defendant as herein mentioned, to wit, on the —— day of ——, A. D. ——, the defendant did at one time lose to one A. B. and the said A. B. did [at one time (*m*)] win of the defendant a certain sum of money, to wit, the sum of £——, by gaming and playing at a certain game called hazard, and the said sum of £——, so lost by the defendant as aforesaid, and so won by the said A. B. as aforesaid, being and remaining unpaid and unsatisfied heretofore, to wit, on &c. it was agreed between the defendant and the said A. B. that the payment thereof, together with other sums then alleged to be due from the defendant to the said A. B. should be secured by the promissory note of the defendant to be by him made, and whereby he promised to pay £—— to the order of the said A. B. as for value received, six months after the date thereof, and the defendant avers that in pursuance of the said agreement, the defendant, to wit, on the day and year last mentioned, made the said promissory note, and thereby promised to pay £—— to the order of the said A. B. as for value received, six months after the date thereof, for securing the payment by the defendant of the said sum of £—— so won and lost as aforesaid, contrary to the statute in such case made and provided; and the defendant avers that the said promissory note so made as aforesaid, was and is the same identical promissory note in the said first count mentioned; and the defendant further saith, that the plaintiff, before and at the time when he first became and was the indorsee and holder of or interested in the said promissory note, well knew that the same had been and was so made upon and for the said illegal consideration; and this the defendant is ready to verify, &c.

Averment. (*n*)

Plea to action by transferree of a banker's cheque against the drawer, that the cheque was drawn and delivered to a third person to secure a gaming debt, and by him delivered to the plaintiff without consideration. (*o*)

And for a further plea in this behalf the defendant says, that before the making of the cheque in the declaration mentioned, to wit, on [&c.], the defendant borrowed of the said B. L. [the transferror] and the said B. L. lent to the defendant, in a common gambling-room, 500 ivory counters, for the purpose, as the said B. L. well knew, of the defendant's illegally gaming at a certain game called French hazard, contrary to the statute; and that for securing to the said B. L. the sum of £500 (being the nominal amount and value of the said counters) for the said loan of the counters so lent by the

(*m*) *Ante*, 47, note (*k*).

(*n*) As to the necessity for this averment since 5 & 6 Will. 4, c. 41, see *ante*, 46, note (*g*).

(*o*) *Bingham* v. *Stanley*, 1 G. & D. 237. A plea to an action by the holder of a cheque that the consideration for it was money won by a third party of the defendant at an illegal game (without showing how the holder is affected) is a bad plea since 5 & 6 Will. 4, c. 41, and is not an issuable plea within the meaning of an order to plead issuably; *Humphreys* v. *Earl of Waldegrave*, 6 M. & W. 622.

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said B. L. to the defendant as aforesaid, he the defendant made the said cheque in the declaration mentioned, and the said B. L. took and received the same in respect of the said loan of the said counters, and on no other account whatsoever: And the defendant further says that the said B. L. transferred and delivered the cheque to the plaintiff without any consideration whatever for so doing, and for the mere purpose of enabling the plaintiff to sue the defendant upon the said cheque for the benefit of the said B. L., and that there never was any consideration whatever for the plaintiff being the holder of the said cheque, but that the plaintiff holds the same, and sues the defendant for the benefit and on the behalf of the said B. L. And this the defendant is ready to verify, &c.

That bill was accepted to secure money won at play.

And for a further plea in this behalf to the first count of the said declaration, the defendant says, that before the accepting of the said bill of exchange by the defendant as therein mentioned, to wit, on &c., the defendant did [at one time *or* "sitting" (*p*)] lose to the plaintiff, and the plaintiff then won of the defendant, a certain sum of money, to wit, the sum of £30, by gaming and playing at a certain game, to wit, a game called ——, contrary to the statute in that case made and provided, and the said sum so lost by the defendant as aforesaid, and so won by the plaintiff as aforesaid, being and remaining unpaid, to wit, on the said, &c., the defendant, for securing the payment thereof, accepted the said bill of exchange in the said declaration mentioned; and the plaintiff then had and received such acceptance for the purpose of that security, contrary to the statute in that case made and provided. And this the defendant is ready to verify, &c.

To action by indorsee against acceptor of bill of exchange, plea that it was accepted for a gaming debt, and that the plaintiff had notice. (*q*)

And for a further plea in this behalf, the defendant says, that long before the drawing or accepting of the bill of exchange in the declaration mentioned, to wit, on the 1st day of February, A. D. 18—, and on divers other days and times afterwards and before the 22nd day of April, 18—, the said H. B. [the drawer] did knowingly lend to the defendant, and the defendant did borrow of him, divers sums of money, amounting, to wit, to £650, for the purpose of enabling the defendant illegally to game and play therewith at a certain illegal game, played with dice, called or known by the name of French Hazard, contrary to the form of the statute in that case made and provided, and the said H. B., at the times of his so lending the said monies, well knew that the defendant so borrowed the same for the purpose aforesaid; and that for securing the payment of the said sums so lent as aforesaid, the defendant afterwards, to wit, on the 22nd day of April, in the year last aforesaid, accepted three several bills of exchange, drawn by the said H. B. upon and directed to the defendant, and payable to the said H. B. [*describe the bills.*] And the defendant further says, that long before the drawing or acceptance of the said bill in the declaration mentioned, to wit, on the 26th day of May, 18—, and on divers other days and times afterwards, and before the 29th day of August, 18—, the said H. B. did knowingly lend to the defendant, and the defendant did borrow of him, divers other sums of money, amounting, to wit, to £565, for the purpose of enabling the defendant to

(*p*) *Ante*, 47, note (*k*).

(*q*) The plaintiff may reply *de injuriâ* to this plea; *Humphreys* v. *O'Connell*, 7 M. & W. 370.

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game and play therewith at a certain illegal game [&c. *as before*] contrary to the form of the statute [&c.] and the said H. B., at the times of his so lending the said monies, well knew that the defendant so borrowed the same for the purpose aforesaid. And the defendant further says, that the said several bills so payable as aforesaid, being due and unpaid, and the said sum of £565 being also unpaid to the said H. B., he the defendant, in consideration thereof, and for and on account of the said bills, and as a security for the payment of the same, and also of the said sum of £565, accepted the said bill in the declaration mentioned, and also a certain other bill, drawn by the said H. B. and directed to the defendant, for the payment of the sum of £565 to the said H. B. or order, eight months after the date thereof; and the said H. B. drew the said bills for and upon that consideration and on that account. And the defendant further says, that the [said M. (*first indorsee*) and the] plaintiff [respectively] before the said indorsement [indorsements] to him [them] had full knowledge and notice of the premises as aforesaid. And this the defendant is ready to verify, &c.

That a promissory note was given to secure part of a sum of money exceeding £10 lost at one sitting at whist, contrary to 9 Ann. c. 14, and that the note sued upon was a *substituted security*. (r)

And the defendant, by Y Z. his attorney, as to the first count of the said declaration, says, that before the making of the said promissory note therein mentioned, to wit, on &c., he the defendant did [at one sitting (*s*)] lose to the plaintiff, and the plaintiff did at one sitting win from the defendant, a certain sum of money [exceeding the sum of £10 (*t*)], to wit, the sum of £——, by gaming and playing at a certain game of cards called whist, contrary to the form of the statute in that case made and provided, and the sum of £——, part of the sum so lost by the defendant as aforesaid, and so won by the plaintiff as aforesaid, being and remaining unpaid as aforesaid, to wit, on &c., aforesaid, the defendant, for securing the payment thereof, and for and on account of the same, made and delivered to the plaintiff the defendant's promissory note for the payment of that sum to the plaintiff, at one month from the date thereof, [and the same not being payable to the plaintiff's order, it was afterwards, to wit, on the day and year last aforesaid, agreed between the defendant and the plaintiff, that the said note should be delivered back by the plaintiff to the defendant and cancelled, and that in lieu thereof, and for securing the payment of the said sum of £——, part of the said sum so lost and won as aforesaid, the defendant should make and deliver to the plaintiff his other promissory note, and whereby the defendant should promise to pay to the plaintiff, or order, £——, one month after the date thereof.] And the defendant avers that in pursuance of the said agreement, and for securing to the plaintiff the payment of the said sum of £——, part of the said sum so lost and won as aforesaid, and for no value or consideration whatever, the defendant, to wit, on the day and year last mentioned, made the said last-mentioned promissory note, and thereby promised to pay £—— to the plaintiff, or order, one month after the date thereof, and the defendant then delivered the said note to the plaintiff, and the plaintiff then had and received it in pursuance of the said agreement, and contrary to the statute in that case made and pro-

(r) See the necessity of stating the original as well as substituted security, *Boulton* v. *Coghlan*, 1 Bing. N. C. 640.

(*s*) *Id. ibid.*

(*t*) *Semble*, unnecessary.

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vided. And the defendant avers that the said last-mentioned promissory note so made as last aforesaid was and is the same identical promissory note in the said first count mentioned. And this the defendant is ready to verify, &c.

Plea, that bill or note was given for settling *stock-jobbing* differences. (u)

And for a further plea in this behalf, the defendant says, that before the making of the said promissory note in the said declaration mentioned, to wit, on &c., the plaintiff for and on the behalf of the defendant contracted and agreed with one J. L. that the said J. L. should sell to the defendant, and that the defendant should buy of the said J. L. a certain interest or share in a public stock, to wit, £——, in the public English (x) stock, commonly called the ——, and that the same should be transferred by the said J. L. to the defendant on &c., and the defendant further says, that the said J. L. was not at the time of the making of the said contract and agreement actually possessed of or entitled unto the said interest or share in the said public stock, so agreed to be sold and transferred by him as aforesaid, in his own name, or in his own right, or in the name or names of a trustee or trustees to or for his the said J. L.'s use, or in his own right, as the plaintiff then well knew, contrary to the form of the statute in such case made and provided, and thereupon, to wit, on the &c., the plaintiff did then, for and on the behalf and as agent of the defendant, voluntarily pay from and out of his own moneys a certain sum of money, to wit, the sum of £——, to the said J. L. for the compounding, satisfying and making up a certain difference for his the defendant's not receiving the said interest or share in the said public stock, and for not performing of the said contract and agreement, the same stock then not being any public or joint stock, or other public security, bought by the defendant or the plaintiff, or any other person or persons, to be delivered, accepted or paid for on a future day, and which had been or was refused or neglected to be transferred, and the said difference or sum of £—— not being recovered or received by the said J. L. or any other person or persons, being the person or persons who first contracted to sell or deliver such public

(u) See other precedents, Petersdorff, 114 to 116, and Chitty's Col. Stat. tit. *Stock-jobbing*. It is now considered that bargains relative to *foreign* stock or securities are not within the stock-jobbing act, 7 Geo. 2, c. 8. (See next note.) Nor does the statute apply to contracts for an actual transfer of stock, but merely for differences to be paid by the one party or the other, according as the stock may rise or fall; and therefore where the stock has been transferred pursuant to a contract, and the defendant has accepted it, he cannot set up the statute to an action for the stock so sold; *Mortimer* v. *M'Callan*, 7 M. & W. 20; affirmed on error, 9 M. & W. 636. Raising and transferring stock in a company is not in itself an offence at common law, and therefore, since the repeal of the Bubble Act (6 Geo. 1, c. 18), by the 6 Geo. 4, c. 91, a plea to an action for money lent, that the plaintiff and the defendant and other persons pretended to act as a trading corporation and raised and transferred stock, without stating any illegal mode or means by which they pretended to act as a company, is bad; *Garrard* v. *Hardey*, 1 D. & L. 51.

Where to an action on a contract to accept shares, the defendant pleaded that the contract was made in France, &c.; that by the law of France all wagers are void; and that the contract was made by the plaintiff and defendant, as in the declaration stated, for the purpose of evading the law of France, and to give it the colour of a bonâ fide and legal transaction, whereas it was in fact a wager made on the price of certain public securities on a future day; the plea was held bad, as amounting to the general issue; *Hannuic* v. *Goldner*, 11 M. & W. 849.

(x) Since the decision in *Rosnun* v. *Taylor*, in Chitty's Col. Stat. 1032, note (*b*), it has been considered in the Courts of King's Bench and Common Pleas that *foreign* stock is not within or affected by the stock-jobbing act, 7 Geo. 2, c. 8; see *Oakley* v. *Rigby*, 2 Bing. N. C. 732; *Wells* v. *Porter*, *id.* 722, confirmed by the Court of Exchequer in *Elsworth* v. *Cole*, 2 M. & W. 31; and see *Patterson* v. *Powell*, 9 Bing. 329; 2 Moore & Scott, 399. Neither are railway shares within the act; *Hewith* v. *Price*, 4 M. & G. 355.

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or joint-stock, or other securities, as the damage which had been sustained by reason of the not delivering or not transferring such stock or other securities by the plaintiff or any other person or persons, contrary to the form of the statute, &c. And the defendant further says that, for the purpose (amongst other things) of securing to the plaintiff the repayment to him by the defendant of the said difference so paid as aforesaid, the defendant, on the said —— day of ——, in the year —— aforesaid, made his said note in the said declaration mentioned, and the plaintiff then accepted and received the same of and from the defendant upon and for the consideration and for the purpose last aforesaid, contrary to the form of the statute. And this the defendant is ready to verify, &c.

Plea under the *treating act*, 7 & 8 Will. 3, c. 4. (*y*)

And for a further plea (except as aforesaid) the defendant says, that before the making of the said promissory note in the said declaration mentioned, to wit, on ——, a certain writ of election of our lady the now queen was duly issued and directed, to wit, to the Lord Bishop of Durham, or his chancellor there, tested on a certain day and year, to wit, the day and year last aforesaid, whereby the said bishop was commanded, among other things, that by writ under the seal of his bishoprick, duly made and directed to the sheriff of the said county of Durham, he should cause the said sheriff to be commanded that he should cause to be elected two knights of the shire, to serve in the then ensuing parliament at Westminster as such knights for a certain place within England, to wit, for the Southern Division of the said county, which said writ, under the seal of the said bishoprick, was duly made and directed and delivered by the said bishop to the said sheriff accordingly, as the said bishop was so commanded as aforesaid, whereby the said sheriff was also so commanded as aforesaid, under and by virtue of the said last-mentioned writ, and according to the exigency whereof, the said sheriff afterwards, and before the return day of the said writ, duly caused an election to be holden for the purpose aforesaid, to wit, on the day and year aforesaid, and that thereupon the defendant became and was one of the candidates at the said election, and appeared at the said election as such candidate to be elected to serve in such parliament as aforesaid, and that divers and very many persons, having voice and vote in the said election, came and appeared at the said election for the purpose of voting for the return of members to serve in the said parliament, to wit, on the day and year aforesaid. And the defendant further says, that the said several sums of money (except as aforesaid) and each and every of them became due from the defendant, and the said promise relating thereto was made by the defendant to the said J. T. for and in respect of divers sums of money, and of divers quantities of meat, drink, entertainment and provisions, paid, given, presented and allowed, by the said J. T. on the behalf of the defendant as such candidate as aforesaid, before his election, on divers days and times between the teste and return of the said writ, to divers persons having voice and vote in the said election, to wit, in order to the defendant being elected to serve in the said parliament for such place as aforesaid, contrary to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

(*y*) The provisions of this act are extended by the 5 & 6 Vict. c. 102, s. 22.

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Plea under 24 G. 2. c. 40, s. 12, that goods sold were *spirits* in quantities under 20*s.* (y)

And for a further plea as to a certain part of the several sums of money except as aforesaid, to wit, as to £50, parcel thereof, the defendant says that the same became due, and the said promise relating thereto was made for and on account of divers quantities of spirituous liquors sold at various times by the said J. T. to the defendant, in articles and items not amounting at any one time to the full value or amount of twenty shillings each, contrary to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

A similar plea pleaded more particularly.

And for a further plea in this behalf, as to the sum of 10*s.* 6*d.*, parcel of the said sum of £——, in which the defendant is in and by the said declaration alleged to be indebted to the plaintiff for goods bargained and sold by the plaintiff to the defendant, the defendant says that the said last-mentioned debt or sum of 10*s.* 6*d.*, became and was due and owing from the defendant to the plaintiff for and on account of spirituous liquors bargained and sold and delivered as in the said declaration mentioned in that behalf, and the said last-mentioned debt was not really *bonâ fide* contracted at one time to the amount of 20*s.* or upwards, but was unlawfully, and contrary to the form of the statute in such case made and provided, contracted at several times, to a much less amount than the sum of 20*s.* at each of those times respectively, viz. a certain sum, to wit, the sum of 2*s.* at one time, to wit, on the —— day, &c.; the sum of 2*s.* at one other time, to wit, &c. whereby and according to the form of the statute in such case made and provided, the plaintiff was not entitled to and became and was incapable of maintaining any action or suit for the said sum of 10*s.* 6*d.*, or of recovering the same either at law or in equity. And this the defendant is ready to verify.

Plea, that the goods sold required a *permit*, but were delivered without. (z)

And for a further plea in this behalf, the defendant says, that the goods in the declaration mentioned to have been supplied to the defendant, and sold and delivered to him by the plaintiff as therein mentioned, were commodities for the removal of which a permit was, at the time of the removal thereof as hereafter mentioned, by law required; and which said commodities were before then, to wit, on the days and times in the said declaration in that behalf mentioned, supplied and sold and delivered by the plaintiffs to the defendant, and removed from and out of certain stock of the plaintiffs, and by them delivered to the defendant without a permit accompanying them, or any or either of them, or any part thereof, contrary to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

To action for breach of agreement on refusing to purchase 100,000 gallons of tar yearly, plea that the tar was to be supplied for the express purpose of being distilled, &c. on certain premises in quantities of above ten gallons at one time, contrary to the statute 25 Geo. 3, c. 77, (the Building Act).

See *The Gas Light and Coke Company* v. *Turner*, 5 Bing. N. C. 666; and on error, 6 Bing. N. C. 324. See similar plea in covenant, *post.*

(y) See *Hughes* v. *Done*, 4 P. & D. 708; see also Petersdorff's Precedents, 113, and the statute and notes, Chitty's Col. Stat. tit. *Spirituous Liquors.*

(z) See 2 Will. 4, c. 16, s. 12; *Nicholson* v. *Hood*, 9 M. & W. 365.

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That acceptance was given to plaintiff to induce him to discontinue the prosecution of a fiat in bankruptcy which he had sued out against defendant (s), contrary to 6 G. 4, c. 16, s. 8.

And for a further plea to the said first count, the defendant says, that before the making and acceptance of the said bill of exchange in the said first count mentioned, to wit, on, &c., he the defendant, then being a trader within the true intent and meaning of the statutes, &c. [*here set out the trading, petitioning creditor's debt, and the act of bankruptcy, as in the special plea of plaintiff's or defendant's bankruptcy, post,*] and thereupon afterwards, to wit, on, &c. a certain fiat, bearing date the day and year last aforesaid, grounded upon the said statutes, upon the petition of the plaintiff, was duly awarded and issued by the Right Honourable the Lord Chancellor of G. B. against the defendant, the plaintiff having then before made such affidavit and given such bond as by law in that case was required, and by which said fiat the said Lord High Chancellor authorized the plaintiff to prosecute his said complaint or petition in her Majesty's Court of Bankruptcy in that behalf. And the defendant avers that the said fiat being in full force, and the defendant continuing and remaining so indebted to the plaintiff and the said other persons, afterwards, and before the defendant had been adjudged to be a bankrupt within the true intent and meaning of the said statute under the said fiat, to wit, on the day and year in the said first count mentioned, it was wrongfully, and against the form of the said statutes and laws then in force concerning bankrupts, agreed by and between the plaintiff and defendant, without the concurrence or consent of the said other creditors of the defendant, that the plaintiff should not further prosecute or put in force, or cause to be prosecuted or put in force, the said fiat, and that he should abandon the same and all further prosecution of and proceedings under the same, and that in consideration thereof, the defendant should accept the said bill of exchange in the said first count mentioned, and deliver the same to the plaintiff. And the defendant says, that in pursuance of the said agreement, and in performance and fulfilment thereof, the defendant did afterwards, to wit, on the said day and year in the said first count mentioned, accept the said bill of exchange and deliver the same to the plaintiff, and the plaintiff then received the same from the defendant accordingly. And the defendant avers that the consideration in this plea mentioned and so agreed on as aforesaid, was the only consideration for the said acceptance of the said bill by the defendant as aforesaid. And this the defendant is ready to verify, &c.

To an action for work and labour as an attorney, plea that the work was done in pursuance of an agreement, and under circumstances amounting to *maintenance*.

See *Findon* v. *Parker*, 11 M. & W. 675.

Plea to action for price of goods that the *sale was on a*

The defendant, by —— his attorney, as to the said supposed cause of action for the price and value of the said horse above alleged to have been sold by the plaintiff to the defendant, saith, that before and at the time of

(s) See 6 G. 4, c. 16, s. 8, altered by 5 & 6 W. 4, c. 41. To a declaration on a bill, see a good plea that it was accepted to induce the stay of proceedings on a fiat in bankruptcy; *Davis* v. *Holding*, 1 Tyr. & Gr. 371; 1 M. & W. 159, S. C. If the consideration for the bill of exchange was partly made up of the original debt, as well as the forbearance to prosecute the fiat in bankruptcy, the plea must allege that the plaintiff by the agreement would have received more than the other creditors, that he had not assets to pay all his creditors in full, and that the fiat had been proceeded with; *Davis* v. *Holding*, 3 P. & D. 413; 11 A. & E. 710, S. C.

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the said sale and delivery of the said horse by the plaintiff to the defendant, the plaintiff carried on the trade and business of a horse dealer, and that the said horse was sold and delivered by the plaintiff to the defendant on Sunday, the —— day of ——, A. D. ——, and in the way of the plaintiff's said trade and business, and in his ordinary calling; and the said promise to pay the price and value thereof was made on that day by the defendant to the plaintiff in the way of the plaintiff's said trade and business, and then being his ordinary calling, and in the course and exercise thereof, upon the said Lord's day or Sunday, the same sale and delivery not being a work of necessity or of charity, and contrary to the statute in such case made and provided. (*b*) And the defendant further saith, that within a reasonable time then next following, to wit, on the Monday immediately after the same Sunday, he rescinded and put an end to the said unlawful bargain or purchase, and then was ready and willing to return and re-deliver, and then tendered and offered to return and re-deliver the said horse to the plaintiff, and then gave him notice of the premises; but he then wholly refused to take back the same. And the defendant hath been always, and still is ready and willing to return and re-deliver the said horse to the plaintiff, and the defendant hath not used or received or had any benefit from or relating to the said horse. And this the defendant is ready to verify, &c.

Sunday, contrary to statute 29 Car. 2, c. 7, sect. 1. (*a*)

And for a further plea in this behalf to the said first and second counts of the declaration, the defendant says, that the plaintiff, under and by virtue of the said first and second counts, claims and seeks to recover against the defendant in this action certain fees, rewards and disbursements alleged to be due to him the said plaintiff for and in respect of business, matters and things done by him the said plaintiff as attorney [*or* "solicitor"] for him the said defendant. And the defendant further saith, that at the time the said business, matters and things, and each and every of them, were done by the

That the plaintiff was not a certificated attorney at the time the work was done and the money paid. (*c*)

(*a*) See Chitty's Col. Stat. *Sunday;* and see 1 Cromp. & Jerv. 180; 6 Bing. 653. *Semble*, that although not usual to do so, the plea should aver that an *offer has been made to return* the commodity; but in the absence of such averment the plaintiff cannot reply that the defendant kept the goods without offering to return them, but must show in addition a new promise to pay after the retaining of the goods by the defendant; *Simpson* v. *Nicholls*, 6 Dowl. 356. See 5 Tyr. 117; 1 Crom. M. & R. 423; 3 Dowl. 171, S. C., where held that an attorney is not within this act. A guarantee given by B. a tradesman, to A. another tradesman, for the faithful services of C. a traveller, to be employed by A., is not an act done in the way of the ordinary business of B. within the meaning of the statute; *Norton* v. *Powell*, 4 M. & G. 42.

(*b*) The plea need not conclude *contra formam stat.*; *Peake* v. *Dicken*, 1 Crom. M. & Ros. 422; 5 Tyr. 116; 3 Dowl. 171.

(*c*) The 6 & 7 Vict. c. 73, s. 27, enacts, "That no person who as an attorney or solicitor shall sue, prosecute, defend or carry on any action or suit or any proceedings in any of the Courts of Queen's Bench, Common Pleas, or Exchequer, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid." This defence must be specially pleaded; *Hill* v. *Sydney*, 7 A. & E. 956; 3 N. & P. 161, S. C. See form of plea in an action by indorsee against the acceptor of a bill of exchange, that the consideration for the acceptance was work done by W., the drawer, as an attorney, and that he was not admitted an attorney of the Court, and that the bill was indorsed to the plaintiff after it became due; *Middleton* v. *Chambers*, 1 M. & G. 97; 1 Scott, N. R. 99; 8 Dowl. 545, S. C. A plea that the plaintiff had not entered his certificate in compliance with the 44 Geo. 3, c. 59, and 54 Geo. 3, c. 144, s. 13 and 14, was holden bad, for not showing that the business was not done between the 15th November and the 1st day of Hilary Term, *Eyre* v. *Shelly*, 6 M. & W. 269; 8 Dowl. 185, S. C.; and a plea alleging want of qualification at the time of action accruing was holden bad under the old acts, *Williams* v. *Jones*, 1 G. & D. 654.

ILLEGALITY BY STATUTE.

plaintiff as such attorney [*or* "solicitor"] as aforesaid, he the said plaintiff had not obtained a stamped certificate which was then in force, and that the said business, matters and things, and each and every of them, were and was done when the plaintiff was without such certificate as last aforesaid. And this the defendant is ready to verify, &c.

That one of the plaintiffs had not been, according to 18 Geo. 2, c. 15, duly admitted as a surgeon before the items of their bill for surgical attendance and medicine had been contracted. (*d*)

And for a further plea in this behalf, as to so much of the said first count of the said declaration as alleges the defendant to be indebted to the plaintiffs for work and labour, care, diligence and attendance of the plaintiffs, by them done, performed and bestowed *as surgeons, and for medicines and other necessary things found and provided, administered, delivered and applied on those occasions* by the plaintiffs, and the supposed promises and causes of action in respect of the same, the defendant says that the said work and labour, care, diligence and attendance, was done and performed and bestowed by the plaintiffs as surgeons; and also the said medicines and things were found and provided by them after the passing of an act of parliament, passed in the 18th year of the reign of his majesty King George the Second, formerly King of England, intituled "An Act for making the Surgeons of London and the Barbers of London two separate and distinct Corporations," and that the same were done within the city of London [*or* "within seven miles of the city of London."] And the defendant says, that at the time of the doing, performing and bestowing the said work and labour, care, diligence and attendance, and the finding and providing the said medicines and things, the said —— [*one of the plaintiffs*] had not been examined, approved and admitted, or licensed by the Master, Governors and Commonalty of the Art and Science of Surgeons of London, to practise the art or practice of surgery, according to the said statute in such case made and provided. And this the defendant is ready to verify, &c.

Plea, to action by stockbroker, that he was not duly licensed pursuant to 6 Anne, c. 16. (*e*)

And for a further plea in this behalf to the first count of the declaration, the defendant says, that the work, labour, care, diligence and attendance in that count mentioned, and therein alleged to have been done, performed and bestowed by the plaintiff as the agent of the defendant, were and are work and labour, care, diligence and attendance done, performed and bestowed by the plaintiff within the city of London as a broker, to wit, as a stockbroker, in and about the purchasing and selling for and on account of the defendant, and bargaining for and on account of the defendant, for and in respect of divers interests and shares in divers public stocks and securities, and divers public bonds and other public securities, and that the commission in the said first count mentioned was and is commission claimed by the plaintiff for and in respect of such work, labour, care, diligence and attendance as aforesaid so done and performed by him the plaintiff as a stockbroker. And the defendant says, that the plaintiff was not at the time or times, or any of them, of doing, performing and bestowing the work, labour, care, diligence and attendance, or any of them, or any part thereof, a broker duly licensed, authorized or empowered to act or practise as a broker in the premises, or any of them, within the said city of London. And this the defendant is ready to verify, &c.

(*d*) See the judgment in *Cope* v. *Rowlands*, 2 M. & W. 159, 160, and the observations there made on the case of *Gremaire* v. *Le Clerc Bors Valon*, 2 Campb. 144.

(*e*) See *Cope* v. *Rowlands*, 2 M. & W. 149.

DEFECT IN FORM OF CONTRACT.

7. DEFECT IN FORM OF CONTRACT.

1. *At Common Law.*

See the Pleadings in *Bird* v. *Higginson*, 4 Nev. & Man. 505.

Plea, to a special count on an agreement for letting to defendant *inter alia* an *incorporeal hereditament*, that the agreement not being by *deed* was void.

See a plea of a *substituted* contract not in writing and signed, *Rippingall* v. *Lloyd*, 5 Bar. & Adol. 742 to 754.

Plea of a substituted contract.

Observations.] *Defect in the form* of contract, or any of its requisites as prescribed by *statute*, must in some cases, since Reg. Gen. Hil. T. 4 W. 4, be *pleaded* in assumpsit. But the Statute of Frauds cannot be pleaded specially; *Leaf* v. *Tuton*, 10 M. & W. 393. A plea of the non-compliance with the statute is nothing but an argumentative denial of the contract, or of the facts from which it is implied by law; and is demurrable on that account. This case differs materially from those in which the contract is avoided by the statute or common law for some matter which (as the plaintiff is admitted to have a colour of action) is the subject of proof *on the part of the defendant*, such as usury, fraud, gaming, infancy, or coverture: an allegation of any of these does not amount to a denial of the contract, but to a confession and avoidance; and these, according to the new rules, must all be specially pleaded. *Id. ibid.*; and see *Turnley* v. *Macgregor*, 1 D. & L. 506. And in assumpsit on a guarantee, the defendant under the general issue may show that the consideration alleged in the declaration is not the actual consideration to be inferred from the instrument; *Raikes* v. *Todd*, 8 A. & E. 846; 1 P. & D. 138, S. C.

2. *By Statute.*

8. PLAINTIFF'S NONPERFORMANCE OF A CONDITION PRECEDENT.

NONPERFORMANCE OF A CONDITION PRECEDENT.

Observations.] Pleas of this nature are usually to a special count, in which the plaintiff must in general aver performance of the condition precedent, or the happening of the event upon which the *defendant's* obligation to perform *his part* of the contract depended. In such case a plea in *denial* and concluding to the country would in general suffice, taking care not to traverse time or place, or any other allegation, when *immaterial*. However, instances may occur where it may be necessary or advisable to *plead specially plaintiff's nonperformance* even to an indebitatus count, as in the following precedents; but care must be observed that the plea does not amount to the general issue.

Plea, that plaintiff's work as an attorney was done on an agreement for no remuneration, held bad, as amounting to general issue denying contract to pay; *Jones* v. *Nanney*, 1 M. & W. 333; *Regil* v. *Green*, *ib.* 328; *Groundsell* v. *Lamb*, *ib.* 336.

Where a declaration in assumpsit describes the terms of the contract in language denoting that a particular act which the plaintiff has engaged to do is to be independent of or concurrent with an act or acts to be done on the part of the defendant, if from the position of the parties, or from the nature

NONPERFORMANCE OF A CONDITION PRECEDENT.

of the agreement, such act is to be considered as intended to constitute a condition precedent, the proper course is to plead *non-assumpsit*, and give the special matter in evidence; and if the defence be specially pleaded, it seems that the plea will be bad on special demurrer, as amounting to the general issue; per Maule, J., *Kemble* v. *Mills*, 1 M. & G. 757. And where a plea qualifies the contract stated in the declaration, and introduces a new stipulation into it, it is bad, as amounting to the general issue, although in truth it only sets out what was the actual agreement between the parties; *Nash* v. *Breeze*, 11 M. & W. 352.

To action by auctioneer against vendor for auction duty, averring the sale and purchase by J. H., plea, that by the conditions of sale the duty must be paid by the purchaser, and that the plaintiff had not demanded it from J. H. (*d*)

And for a further plea in this behalf, the defendant says, that it was one of the conditions of the said sale in the declaration mentioned, that the purchaser should immediately after the sale pay the auction duty upon the purchase money; yet the plaintiff, not regarding his duty as such auctioneer, did not demand payment of the said auction duty from the said J. H. [the purchaser], according to the form and effect of the statute, but at the time of the said bidding wholly neglected and hath hitherto wholly neglected so to do. And this the defendant is ready to verify, &c.

To action for wages, plea that plaintiff forfeited them (according to agreement) by getting drunk. (*e*)

And for a further plea in this behalf, the defendant says, that when the plaintiff entered into the service of the defendant as in the declaration mentioned, to wit, on [&c.], it was agreed by and between the plaintiff and the defendant, that in case he the plaintiff should at any time during the continuance of the said service, and whilst he was such servant of the defendant, voluntarily become drunk and get intoxicated, he the said plaintiff should forfeit and lose all wages and sums of money then due to him from the defendant in respect of such service, and the defendant should cease to be liable for the same, or any part thereof. And the defendant further says, that the defendant performed the services in the declaration mentioned, and that afterwards and after the said sum of money became due and while he the plaintiff was in the said service of the defendant as such servant as aforesaid, and before the commencement of the suit, to wit, on [&c.], the plaintiff voluntarily became drunk, and thereupon and thereby the plaintiff forfeited the wages in the declaration mentioned. And this the defendant is ready to verify, &c.

To an action for discharging a clerk without reasonable or probable cause, plea that the plaintiff misconducted himself. (*f*)

And for a further plea in this behalf, the defendant says, that at the time of the dismissal of the plaintiff from the service of the defendant, the plaintiff conducted himself in such an improper, offensive, disobedient and insolent manner, that the defendant was forced and obliged to dismiss the plaintiff, and could not longer keep him in his service; without this, that the defendant then wrongfully dismissed and discharged the plaintiff without any reasonable or probable cause, in manner and form as the plaintiff has in

(*d*) See 17 Geo. 3, c. 50, s. 8; *Willson* v. *Carey*, 11 M. & W. 368; and see 10 M. & W. 641.

(*e*) See *Monkman* v. *Shepherdson*, 3 P. & D. 182; and see new assignment to this plea, *post*.

(*f*) See *Amor* v. *Fearon*, 9 A. & E. 548; 1 P. & D. 398. See similar plea of misconduct of the plaintiff as manager of a company, and as to the requisite evidence in support of it, *Cussons* v. *Skinner*, 11 M. & W. 162. See also plea in *Baillie* v. *Kell*, 4 Bing. N. C. 638.

the said declaration thereof above alleged. And this the defendant is ready to verify, &c.

NONPERFORMANCE OF A CONDITION PRECEDENT.

To an action by a sailor against the owner of a vessel for preventing his performance of contract of service by putting him on shore and preventing his return to the vessel, plea that plaintiff was guilty of mutiny; and other facts. (*g*)

And for a further plea in this behalf, the defendant says, that the said promise in the declaration [*or* "*first* count"] mentioned, was and is a certain agreement in writing, made, to wit, on [&c.], and made pursuant to the directions of an act of parliament passed in the sixth year of the reign of his late majesty King William the Fourth, between and signed by one W. H. in his lifetime [since deceased], then master of the said ship in the first count mentioned, and the plaintiff and certain other persons whose names are subscribed thereto, whereby it was agreed by and on the part of the plaintiff and such last-mentioned persons, and they severally thereby engaged to serve on board the said ship in the several capacities against their respective names expressed, on a voyage from the port of London to [the Southern Ocean, for oil, ambergris, furs and skins, usually called the Southern Whale Fishery,] and back to the port of London; and the crew further agreed to conduct themselves in an orderly, faithful, honest, careful and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful commands of the master in every thing relating to the said ship and the materials, stores and cargo, whether on board such ship, in boats or on shore, and that each of the crew should use and exert his utmost skill and ability for the preservation of the ship and her boats, tackle, apparel, furniture, stores and cargo, until she should have arrived back at the port of London, and her cargo should be there delivered to the owner, and no person should neglect or refuse to do his duty by day or night until the said then intended voyage should be ended and the ship discharged of her cargo; and that neither of the said crew should excite or cause to be excited any commotion or strife of any kind, or do any act or thing to occasion mutiny, disobedience of orders, insubordination, or other bad or improper conduct on board the said ship, or in her boats or on shore [*set out any other material parts of the agreement*]. And the defendant says, that afterwards and during the continuance of the said voyage in the said declaration [*or* "first count"] mentioned, and before the refusal to suffer and permit the plaintiff to go and proceed the remainder of such voyage, as therein also mentioned, to wit, on [&c.], the said W. H., the said master of the said ship, died, and thereupon one M. S., then being the first mate of and next in command to the said W. H. in and on board of the said ship, and then became and was and exercised the duties of master in and on board of such ship, and continued to be and was such master thereof until the completion of the said voyage in the said declaration [*or* "first count"] mentioned. And the defendant further says, that the plaintiff, after the making of the said agreement, and during the continuance of the said voyage and after the death of the said W. H., to wit, on [&c.], and on divers other days and times between that day and the —— day of ——, in the year last aforesaid, and whilst the plaintiff continued in and on board of the said ship in

(*g*) See *Renno* v. *Bennett*, 3 G. & D. 54. Where a seaman, who has signed the articles of agreement required by 5 & 6 Will. 4, c. 19, absolutely quits the ship, without any animus revertendi, after her arrival and being moored at her port of delivery, but before her cargo has been discharged, he does not incur a total forfeiture of his wages within the 9th section of that statute, but only of a month's wages under the 7th section; *M'Donald* v. *Jopling*, 4 M. & W. 285.

NONPERFORMANCE OF A CONDITION PRECEDENT.

such capacity as aforesaid, wrongfully and improperly neglected and refused to perform his duty as such [carpenter's mate] as aforesaid, although he was then requested and commanded by the said M. S. as such master of the said ship as aforesaid, so to do; and the plaintiff then, and whilst he was so on board the said ship in such capacity as aforesaid, excited and caused to be excited great commotion and strife in and on board the said ship, and mutinously refused to proceed on the said voyage, and endeavoured as much as in him lay to occasion mutiny, disobedience of orders and insubordination, and was guilty of other bad, violent and mutinous and improper conduct in and on board the said ship, wherefore the defendant, so being such owner of the said ship as aforesaid, for such disobedience and neglect of duty and mutinous and improper conduct of the plaintiff as aforesaid, during the continuance of the said voyage and before the completion thereof, to wit, on the day and year last aforesaid, discharged the plaintiff from his said employment, as he lawfully might for the cause aforesaid. And this the defendant is ready to verify, &c.

To an action for not accepting goods bargained and sold, to be delivered within a certain time, plea that the tender of delivery was made at an improper time. (*h*)

And the defendant by ——, his attorney, says that the said tender of and offer to deliver the said [linseed oil], and the request to accept the same in the declaration mentioned, were made on the last day of the said [fourteen days], at a late time of that day, to wit, at nine o'clock in the night time, the same being by reason of such lateness thereof an unreasonable and improper time in that behalf for the said tender and delivery of the said oil; and that the plaintiffs were not until a late, and for the delivery and acceptance of the said oil an unreasonable and improper, time of the day, to wit, at the hour aforesaid, ready or willing to deliver the said linseed oil to the defendant, in manner and form as the plaintiff has in the said declaration thereof alleged. And this the defendant is ready to verify, &c.

To action by purchaser against vendor for not delivering abstract of title and making a good title, plea that defendant delivered abstract, but that the plaintiff did not according to the conditions of sale take objections thereto in due time. (*i*)

And for a further plea in this behalf, the defendants say that they the said defendants within [twenty] days after the said sale, to wit, on [&c.] delivered at the expense of them the said defendants to the solicitor of the plaintiff an abstract of the title to the said [reversionary estates and interests], yet neither the plaintiff nor his solicitor did within [ten] days after the delivery of the said abstract take any objections to the said title in writing according to the true meaning of the said conditions, nor were any such objections taken or communicated to the defendants ortheir solicitor. And this the defendants are ready to verify, &c.

To assumpsit for breach of warranty of a horse, plea that the horse was sold on the terms that the warranty was to remain in force

And for a further plea in this behalf, the defendant says that before the making of the promise by him in the declaration mentioned, he the defendant sent the said horse in the declaration mentioned to a certain place for the sale of horses, called Lucas's Repository, there to be sold according to certain rules, which were in the words following: "Terms of private sale. A warranty of soundness, when given at this repository, will remain in force until

(*h*) See *Startup* v. *Macdonald*, 2 M. & G. 895. See *Isherwood* v. *Whitmore*, 10 M. & W. 757, as to pleading refusal to permit inspection of goods tendered, and also *Pettit* v. *Mitchell*, 4 M. & G. 819.

(*i*) See *Smith* v. *Tanner*, 1 M. & G. 802, and also *Barnett* v. *Wheeler*, 7 M. & W. 364. As to pleas denying title of vendor, see *Wheeler* v. *Wright*, 7 M. & W. 359; *Laird* v. *Pim*, *ib.* 474; *De Medina* v. *Norman*, 9 M. & W. 820.

twelve o'clock at noon of the day next after the day of sale, when it will be complete, and the responsibility of the seller will terminate, unless in the meantime a notice to the contrary, accompanied by the certificate of a veterinary surgeon, be delivered at the office of R. Lucas; such certificate to set forth the cause, nature, or description of any alleged unsoundness;" of all which the plaintiff before and at the time of making the said promise had notice. And the defendant further says, that the sale of the horse in the declaration mentioned was a private sale, and that the promise of and the buying from the defendant in the declaration mentioned took place subject to the said rules and regulations touching the private sale of horses, and that the same were agreed to by the plaintiff and the defendant. And although the time limited by the said rules for the delivery of the notice and certificate had elapsed before the commencement of this suit, yet the defendant avers that no such notice or certificate as hereinbefore mentioned was delivered by or for the plaintiff at the office of the said R. Lucas. And this the defendant is ready to verify, &c.

NONPERFORMANCE OF A CONDITION PRECEDENT.

for a certain time when it would be complete, unless in the meantime a notice and certificate of unsoundness were given, and that such notice and certificate were not given within the time limited. (*i*)

See *Burton* v. *Griffiths*, 11 M. & W. 817.

To an action against overseers on an agreement to pay costs, to be taxed, of an appeal, the declaration alleging that the costs were taxed in a reasonable time after the making of the agreement, plea that the costs were not taxed in a reasonable time.

Plaintiff's want of skill as a surgeon, attorney, &c., and his non-performance of his duty have been sometimes pleaded specially; but care must be observed that the plea be not demurrable, as amounting to the general issue; see *Tabram* v. *Warren* 1 Tyr. & Gr. 155; *Randall* v. *Ikey*, 4 Dowl. 682; *Cousens* v. *Paddon*, 4 Dowl. 492, 493; *Gregory* v. *Hartnoll*, 4 Dowl 699; overruling *Roffy* v. *Smith*, 6 Car. & P. 662; *Horne* v. *Ramsdale*, 9 M. & W. 329; *Bulcher* v. *Stewart*, *ib.* 405. See pleas by carriers, *post*, *Case*.

Other pleas of plaintiff's nonperformance or breach of contract.

9. DEFENDANT'S EXACT PERFORMANCE OF CONTRACT.

DEFENDANT'S EXACT PERFORMANCE OF CONTRACT.

Since Reg. Gen. Hil. T. 4 W. 4, r. 3, the defendant must in general *specially plead his performance or payment* according to the contract, or *deny the breach* stated in the declaration by *express traverse*, and cannot give such ground of defence in evidence under the plea of non-assumpsit; but *part* performance may still (though *part payment* cannot) be given in evidence *merely in reduction of damages* under non-assumpsit or other plea. There is a material difference in pleading performance or payment, in punctual performance of the contract, and performance or payment *after* the appointed time; the *latter* can only be pleaded by way of *accord and satisfaction, and acceptance* by the plaintiff, in discharge of damages; see *Ensall* v. *Smith*, 1 Crom. M. & Ros. 522; 3 Dowl. 193; and *Mack* v. *Rust*, 4 Dowl. 206, 207; S. P. *Kington* v. *Kington*, 11 M. & W. 234.

And for a further plea in this behalf, the defendant saith, that he at the said time, (*k*) and in manner so agreed upon between the plaintiff and the

Plea that defendant strictly performed his contract. (*k*)

(*i*) See *Smart* v. *Hyde*, 8 M. & W. 723.

(*k*) The plea must show performance *strictly according* to the agreement, for if the performance were not until *after breach*, then it must be pleaded by way of accord and satisfaction, as *post*, admitting that plaintiff *once had* cause of action.

DEFENDANT'S EXACT PERFORMANCE OF CONTRACT.

defendant, did &c. [*here state the performance in the words and according to the intent of the promise or agreement,*] according to the form and effect of the said articles of agreement [*or* "memorandum of agreement,"] and of the said promise of the defendant. And of this the defendant puts himself upon the country, &c. (*l*)

Observations.]—Defendant should plead his performance in the very words of the promise, or in the negative of the breach assigned, *and not more*, and therefore where the breach assigned was only nonpayment of a *principal* sum, a plea of payment of that sum and also of *interest* would be demurrable; 1 Crom. M. & Ros. 12.

Plea, that the defendant duly accounted. (*m*)

And for a further plea in this behalf to the said first count, the defendant saith, that after the delivery of the said goods and chattels in the declaration mentioned to the defendant, for the purposes aforesaid, and after the sale of the said goods and chattels in the declaration mentioned, and within a reasonable time for that purpose, and before the commencement of this suit, to wit, on &c. he the defendant rendered to the plaintiff a just and true account of the said goods and chattels in the declaration mentioned, and then did pay over to him the plaintiff the monies arising therefrom, to wit, the sum of £——, which sum the plaintiff then accepted and received of and from the defendant, in full satisfaction and discharge of the said promise in the said first count mentioned. And this the defendant is ready to verify, &c.

Payment of a bill or note at the day. (*n*)

And for a further plea in this behalf the defendant says, that *on the day when the said bill* [*or* "note"] *became due*, to wit, on &c. he the defendant paid to the said plaintiff the said sum of £—— in the said bill [*or* "note"] specified, according to the tenor and effect thereof. [*If the bill or note was payable with interest from the date, then also say,* "together with all interest that had then accrued due in respect thereof."] And of this the defendant puts himself upon the country, &c. (*o*)

Plea of payment of part at the specified time, pursuant to the promise, (*p*) and non-assumpsit as to the rest.

And for a further plea in this behalf as to the sum of £——, parcel, &c. the defendant saith, that after the making of the said promise in the said —— count mentioned as to the said sum of £——, part of the said sum of £—— in that count mentioned, and before the commencement of this suit, and at the time named and appointed by the plaintiff and the defendant in that behalf, and before any breach of the said promise, to wit, on &c. he

(*l*) See conclusion in Petersdorff's Prec. 308. But if not merely a negative of declaration the plea should *conclude with a verification; Ensall* v. *Smith*, 1 Crom. M. & Ros. 523; *id.* 12; 3 Dowl. 193, S. C. And a plea of *payment* even before breach *must* so conclude; *Goodchild* v. *Pledge*, 3 Crom. M. & Ros. 363.

(*m*) See Petersdorff's Precedents, 31. *Quære*, whether it should be alleged in *satisfaction* of the promise.

(*n*) See *Mack* v. *Rust*, 4 Dowl. 206. In the case of a contract to pay money on *a particular day, payment* on that day is a denial of the breach; but in the case of an action for a debt payable on *request, i. e.* immediately, payment is new matter, and must therefore be shown to have been made in satisfaction; *Kington* v. *Kington*, 11 M. & W. 234.

(*o*) The plea must conclude to the country, *Wilkes* v. *Hopkins*, 1 D. & L. 499; where see plea of payment and non damnificatus to action by the drawer and indorser of a bill for the defendant's accommodation.

(*p*) This form is proper when the payment was made in exact and punctual performance of the contract, and *before breach*. But if the payment were made *after breach*, then it must be pleaded by way of accord and satisfaction of the debt and damages, *Kington* v. *Kington*, 11 M. & W. 234.

the defendant paid to the plaintiff the said sum of money [*or* "the said monies"] in the declaration mentioned. And of this the defendant puts himself upon the country. And as to the residue of the said monies [*or* "sum of money"] in the said declaration mentioned, the defendant says, that he did not promise in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant also puts himself upon the country, &c.

Defendant's exact Performance of Contract.

10. Offer to perform, as a Tender.

Tender.

Tender or offer to perform.

See form of plea of tender, *post*.

11. Excuses of Performance.

Excuses of Performance.

Observations.]—Defences, on the ground that there has been a substituted contract, must be pleaded specially; Roscoe's Tracts, 29; *Pearson* v. *Pearson*, 5 Bar. & Adol. 859. But where the terms of a contract are varied by a contemporaneous memorandum, a defence arising therefrom may be given in evidence under the general issue; but if the memorandum was made after the original contract, such a defence must be pleaded specially; *Heath* v. *Durant*, 1 Dowl. & L. 571. See the *form held good on demurrer*, *Broad* v. *Calmer*, 5 Nev. & Man. 413; 5 Bing. 373; a plea held good, *Taylor* v. *Hilary*, 1 Gale, 23, 47, 48; 1 Crom. M. & Ros. 742; 5 Tyrw. 373; 7 Car. & P. 31, S. C.; and which was as in the next precedent. If the first contract declared on was under seal, it must be averred that the substituted contract was at least in writing; *Rippingall* v. *Lloyd*, 5 Bar. & Adol. 742; and see when it is necessary that the substituted contract should have been in writing, Chitty, jun. Precedents, 375, note (*o*); plea of a subsequent account stated, *Fidgetts* v. *Penny*, 1 Crom. M. & Ros. 108; plea of a substituted bill, *Lewis* v. *Lister*, 4 Dowl. 377. See also *ante*, vol. i. p. 505.

Substituted contract before breach.

That after the making of the said promise in the said *first* count mentioned, and *before any breach thereof*, to wit, on, &c. it was at the request of the plaintiff agreed by and between the plaintiff and the defendant, that the plaintiff should supply to the said H. Holt £200 worth of goods as he should want them, and that such goods should be paid for at the end of three months by a joint bill at four months, accepted by the defendant,

Plea, that after promise and before breach, a new agreement was made between the plaintiff and defendant, that plaintiff should supply a named third person with goods for £200, to be paid for at three months, and that plaintiff accepted such agreement in full discharge of the promise declared upon, and thereby plaintiff released defendant from performance of such promise. (*p*)

(*p*) Where to indebitatus assumpsit for money paid the defendant pleaded that the money was paid by the plaintiff as defendant's agent in the purchase of shares in a company, that after the payment the plaintiff received certificates of title to the shares, and ought to have delivered over the same to the defendant; but that instead thereof, the plaintiff converted the certificates to his own use, and prevented the defendant from disposing of the shares, which were consequently of no use to the defendant; the plea was held bad, as it admitted the plaintiff's right of action to be completed, and set up, by way of confession and avoidance, that which was only a ground of cross action; *Francis* v. *Baker*, 2 P. & D. 569.

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which agreement of the defendant he the plaintiff, *before any breach* of the promise in the said first count mentioned, accepted in full discharge of that promise, and thereby then wholly released and discharged the defendant from the further performance of that promise. And this the defendant is ready to verify, &c.

Plea of substituted contract at a reduced price, to action for work and materials, and payment of reduced sum.

See *Rogers* v. *Constance*, 4 P. & D. 574.

To an action for non-delivery of goods, plea that the plaintiff when he requested the delivery refused to pay the price. (*q*)

And for a further plea in this behalf to the said first count of the declaration, the defendant says that the plaintiff at the said time when he requested the defendant to deliver to the said H. the said [thirty-nine pockets of Sussex hops, called Springett's], as in the first count of the declaration mentioned, refused to pay him the defendant for the said thirty-nine pockets of Sussex hops, called Springetts', although then requested by the defendant so to do; *without this* that the plaintiff was ready and willing to pay the defendant for the said hops so bought of the defendant as aforesaid, in manner and form as in the first count of the declaration alleged; and of this the defendant puts himself upon the country, &c.

To an action for not delivering goods conveyed from Dublin to London in a reasonable time after landing, plea that before a reasonable time elapsed the goods were accidentally destroyed by fire. (*r*)

And for a further plea in this behalf to the said second count of the declaration, the defendant says that the steam vessel called the "William Fawcett," therein mentioned, was and is a vessel used and employed by the defendants for the conveyance of goods for freight from the said port of *Dublin* to the port of *London*, and that the goods in the second count mentioned were shipped and received on board the said steam vessel at Dublin aforesaid, upon and under the terms and conditions contained in a certain bill of lading, wherein it was expressed that the said goods were to be delivered at the said port of London in the like good order and condition in which they were so shipped (all and every the dangers and accidents of the seas, steam navigation of what nature and kind soever, excepted), unto the plaintiffs or his assigns, paying for the said goods freight and charges as mentioned in the margin thereof, with primage and average accustomed. And the defendant further says, that after the arrival of the last-mentioned steam vessel at London with the said goods on board thereof, as in the second count mentioned, and after the said goods had been safely landed upon the said wharf as therein also mentioned, the defendants caused the same to be safely deposited and stored upon the said wharf until they could be carried therefrom and delivered to the plaintiff, the said wharf before that time and then being a place wherein goods conveyed in steam vessels from Dublin aforesaid to the port of London were, on their arrival at the last-mentioned port, used and accustomed to be landed and deposited for safe custody until they could be carried therefrom and delivered to the consignees thereof, and a place fit and proper for such purposes, and that the defendants did take care of the said goods and merchandize whilst they remained and were stored and deposited upon the said wharf, for the purpose

(*q*) *Ford* v. *Yates*, 2 M. & G. 549.

(*r*) See declaration and pleas in *Bourne* v. *Gutliffe* (in error), 3 M. & G. 643; 3 Scott, N. R. 1; where this plea was held good, reversing the judgment of the Court below.

last aforesaid, from the time of the said landing thereof until afterwards, and whilst they continued so stored and deposited, and before they could be carried from the said wharf, and before a reasonable time for their being so carried or for the delivery thereof to the plaintiff had elapsed, to wit, on the —— day of ——, A. D. 18—, the same goods and every part thereof were, together with divers other goods then being upon the said wharf for the like purposes, casually consumed and destroyed by a fire which then happened and broke out by accident; by means whereof and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in the defendants, they were hindered and prevented from delivering the said goods to the plaintiff. And this the defendants are ready to verify, &c.

EXCUSES OF PERFORMANCE.

See *Phillips* v. *Aflalo*, 4 M. & G. 846.

Plea, that the plaintiff agreed to send out a vessel and receive certain goods to be shipped by the defendant in liquidation of the debt sued for.

And for a further plea in this behalf, the defendant saith, that after the making the contract and promise of the defendant in the declaration mentioned, *and before any breach or non-performance thereof* by the defendant, and before the commencement of this suit, to wit, on &c., it was mutually agreed by and between the plaintiff and the defendant, that the said contract and promise should then be, and the same then was, *wholly rescinded* and abandoned by the plaintiff and the defendant accordingly. (*t*) And this the defendant is ready to verify, &c.

RESCINDING OF CONTRACT BEFORE BREACH

Plea, that the contract declared on was before breach abandoned by mutual consent. (*s*)

And for a further plea in this behalf, the defendant says, that after the sale and delivery of the said goods, and before the commencement of this suit, and before any cause of action had accrued to the plaintiff in that behalf, to wit, on, &c. the defendant, at the request of the plaintiff, returned and re-delivered to the plaintiff a parcel of the said goods so sold and delivered as aforesaid, amounting in price and value, to wit, to the sum of £——, parcel, &c. as aforesaid, and the plaintiff then accepted and received the same, and it was then consented and agreed by and between them that the said bargain and sale thereof by the plaintiff to the defendant, and the defendant's and plaintiff's mutual promises as to the same, should be rescinded, cancelled, made void, and of none effect, and the said bargain and sale, and the said mutual promises of the defendant and plaintiff, were accordingly then rescinded, cancelled, made void, and of none effect. And this the defendant is ready to verify, &c.

Plea, that the defendant *returned the goods* to the plaintiff, and with his consent the bargain was rescinded. (*u*)

(*s*) See *Taylor* v. *Hilary*, 1 Crom. M. & R. 742; *Latch* v. *Wedlake*, 3 P. & D. 499; and n. (*y*), *post*, 66. The plea must aver that the contract was *rescinded before breach*; *Edwards* v. *Chapman*, 1 M. & W. 231; 4 Dowl. 732, S. C.

(*t*) *Semble*, it should be averred that thereupon the said contract and agreement was then wholly rescinded and abandoned by the plaintiff and defendant accordingly.

(*u*) See *Edwards* v. *Chapman*, 1 M. & W. 231, where Parke, B. says, "A duty arises from the contract of sale which cannot be got rid of without an accord and satisfaction;" from which it appears that the plea in the text is bad to a common count for goods sold and delivered, and that the facts should be pleaded by way of accord and satisfaction.

EXCUSES OF PERFORMANCE.

To an action on a guarantee, plea that the instrument was altered whilst in the plaintiff's possession, by affixing a seal against the defendant's signature. (*v*)

And for a further plea in this behalf, the defendant says, that after the said guarantee or agreement in writing in the said declaration mentioned had been made and signed by the defendant as in the said declaration mentioned, and after the defendant, in consideration of the premises in the said declaration mentioned, had promised as in the said declaration mentioned, and after the same guarantee or agreement in writing had been delivered to the plaintiff, and before the commencement of this suit, and whilst the said guarantee or agreement in writing was such continuing guarantee as in the said declaration mentioned, and was in the possession of and held by the said plaintiff for the purposes in the said declaration mentioned, to wit, on &c. the said guarantee or agreement in writing in the said declaration mentioned was, without the knowledge or consent of the defendant, by some person or persons to the defendant then and now unknown, altered in a material particular, and its nature and effect materially changed, by such unknown person or persons putting and affixing, and causing and procuring to be put and affixed to the same agreement or guarantee in writing, a certain seal by and near to the signature of the defendant to the same agreement or guarantee in writing, and as and for the seal of the defendant to the said guarantee or agreement in writing, and thereby and without the consent of the defendant wrongfully causing the said guarantee or agreement in writing, after the defendant had written his name thereto as aforesaid, to purport to have been sealed by the defendant, and to be the deed of the defendant; and the defendant says that the said guarantee or agreement in writing, upon which such seal had been so wrongly put to and affixed as aforesaid, is in fact the same guarantee or agreement in writing in the said declaration mentioned; and so the defendant says, that by reason of the premises in this plea mentioned, the said guarantee or agreement in writing in the said declaration mentioned, from the time of the said alteration, and the putting and affixing the said seal thereto in manner aforesaid, and before the commencement of this suit, was and is void in law and of none effect. And this the defendant is ready to verify, &c.

Plea to assumpsit for breach of promise to marry, a mutual discharge of promises *before any breach*. (*x*)

And for a further plea in this behalf the defendant says, that after the making of the said promise in the said declaration mentioned, and before any breach thereof had been committed by the defendant or the plaintiff, and before the commencement of this suit, to wit, on, &c. it was mutually agreed by and between the plaintiff and the defendant, that neither of them should thereafter perform the said respective promises on their parts respectively, and that the same should be waived, abandoned and rescinded, and that the plaintiff and the defendant should be respectively discharged from performing their promises on their respective parts, and the said respective promises were thereby then accordingly waived, abandoned, and wholly rescinded. And this the defendant is ready to verify, &c.

Another form. (*y*)

And for a further plea in this behalf, the defendant says, that after the making of the promise in the declaration mentioned, and before any breach

(*v*) See *Davidson* v. *Cooper*, 11 M. & W. 778; 1 D. & L. 377, S. C.; and see *post*, "*Pleas to Declarations on Bills, &c.*"

(*x*) See a plea of immoral conduct on part of plaintiff, and therefore defendant refused to marry her, Chitty, jun. Prec. 350; and a plea that plaintiff engaged to marry a third person, and publication of banns, and therefore defendant refused to marry plaintiff, *ib.* 351.

(*y*) This is a good plea, *King* v. *Gillet*, 7 M. & W. 59; but it appears to be very immaterial, as regards the proof, which of the

thereof by the defendant, to wit, on &c., the plaintiff wholly absolved, exonerated and discharged the defendant from his said promise and from the performance of the same. And this the defendant is ready to verify, &c.

EXCUSES OF PERFORMANCE.

And for a further plea in this behalf, the defendant saith, that after the making of the said promise in the said declaration mentioned, and within a reasonable time in that behalf, and before the commencement of this suit, to wit, on the day and year aforesaid, the defendant, being desirous to marry the said plaintiff, according to the true intent and meaning of his said promise, but being in a condition of poverty and wholly unable by reason of unavoidable misfortune to support and provide for the plaintiff in such manner as would have been requisite for her due maintenance and comfort in the state of matrimony, represented and communicated the same to the plaintiff, and thereupon and in consideration of the premises it was then agreed by and between the plaintiff and the defendant for their mutual benefit and convenience, that the celebration of the said proposed marriage should be altogether postponed till such a time as the defendant should be in a condition of greater affluence, and able to support and provide for the plaintiff in the manner above-mentioned. And the defendant in fact says, that he hath not been at any time since the making of the said agreement, nor hath he been at any time able to be, nor is he yet in a condition of greater affluence, or better able in any respect to support or provide for the plaintiff in such a manner as would be requisite for her due maintenance and comfort in the state of matrimony, whereof the plaintiff hath continually had notice. And this the defendant is ready to verify.

Plea to a declaration for not marrying, admitting the defendant's promise, but that he became impoverished and unable to support the plaintiff as his wife, and represented the same to the plaintiff, and that therefore the marriage was by *mutual consent postponed till the defendant* should be able &c. and which as yet he is not.

See *Young* v. *Murphy*, 2 Hodges' Rep. 144; 3 Bing. N. C. 54.

Plea in similar action that the plaintiff was unchaste, and therefore the defendant refused to marry her.

12. HIGHER SECURITY GIVEN.

HIGHER SECURITY

Observations.]—If on account of a contract not under seal a higher security, as a bond, be taken, it merges the remedy by assumpsit, and may be pleaded in bar. Such a substitution of security usually is pleaded by way of accord and satisfaction, see *post*, a plea of a bond executed in satisfaction; but if given *before breach of the promise* the *substitution* of security might be pleaded in bar generally and not by way of accord and satisfaction.

Plea of a higher security received by plaintiff before breach.

13. ACTION PREMATURELY BROUGHT.

ACTION PREMATURELY BROUGHT.

Observations.]—According to *Edmunds* v. *Harris*, 2 A. & E. 414; 4 Nev. & Man. 182; 6 Car. & P. 547; defences of this nature, such as that the goods were sold *on credit* not elapsed, must have been pleaded specially even to an indebitatus count. But in *Alexander* v. *Gardner*, 1 Bing. N. C. 671;

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two forms is adopted, as it was intimated in that case that the defendant would not succeed unless he proved a proposition to exonerate on the part of the plaintiff acceded to by himself, which would in effect be a rescinding of the contract previously made.

ACTION PREMATURELY BROUGHT.

1 Scott, 281; 3 Dowl. 146, S. C; *Taylor* v. *Hilary*, 1 C. M. & R. 1; 1 Gale, 23, S. C.; *Knapp* v. *Harden*, 1 Gale, 47, 48; *Broomfield* v. *Smith*, 1 M. & W. 542; and Roscoe's Tracts, 23; it was more correctly decided that such ground of defence may be given in evidence under a plea of non-assumpsit; and a special plea might be demurred to as amounting to the general issue. An indorser cannot plead that the action against him was commenced before the expiration of a reasonable time after notice; *Siggers* v. *Lewis*, 1 Crom. M. & Ros. 376.

To an action for not completing a literary engagement, plea that a reasonable time had not elapsed, and other pleas.

See *Sweet* v. *Lee*, 3 M. & G. 452.

Attorney's bill not delivered one month before the action, contrary to stat. 6 & 7 Vict. c. 73, s. 37. (s)

And for a further plea in this behalf to the first count of the declaration the defendant says, that this action was commenced after the 22d day of August, A. D. 1843, and that the same is prosecuted by the plaintiff against the defendant to recover from the said defendant the amount of certain fees, charges and disbursements by the plaintiff claimed and demanded to be due to him from the defendant for the work and labour, &c. [*as in the first count,*] of the plaintiff by him bestowed as the attorney and solicitor of and for the defendant. And the defendant further saith, that the plaintiff did not, one month before the commencement of this suit, deliver unto the defendant, (she being the party to be charged therewith,) or send by the post to or leave for her at her counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements, subscribed with the proper hand of the plaintiff, or inclosed in or accompanied by a letter subscribed in like manner, referring to such bill, pursuant to the statute in such case made and provided. And this the defendant is ready to verify, &c.

Plea, that although a bill was delivered subscribed, yet a month did not expire after that or any other delivery before commencement of the action. (a)

And for a further plea in this behalf, to the first and second counts of the declaration, the defendant says, that this action was commenced after the 22d

(s) The late statute 6 & 7 Vict. c. 73, s. 37, enacts, "That no attorney or solicitor, nor any executor, administrator, or assign of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements, for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assign of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor, (or, in case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership,) or of the executor, administrator, or assign of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner, referring to such bill." The same section provides, "That it shall not in any case be necessary, in the first instance, for such attorney or solicitor, or the executor, &c., in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a bonâ fide compliance with this act." Under the former act 2 Geo. 2, c. 23, s. 23, this defence must have been specially pleaded; *Lane* v. *Glenny*, 7 A. & E. 83; 2 N. & P. 258, S. C. This is an issuable plea, *Wilkinson* v. *Page*, 13 L. J. R. N. S. C. P. 121.

(a) The month must consist of 28 days, exclusive of the day of delivering the bill and the day of commencing the action; *Blunt* v. *Heslop*, 3 N. & P. 553. As the last plea would put the plaintiff to proof of the delivery of a bill one month before the commencement of the suit, it seems that that plea would in all cases suffice.

day of August, A. D. 1843, and that the said work, care, &c. [*here use the words of the declaration*] by the plaintiff made, performed and given in and about the business of the defendant, was made, performed and given by the plaintiff as attorney and solicitor of and for the defendant, and that the said monies paid by the plaintiff for the use of the defendant were paid and disbursed by the plaintiff as such attorney and solicitor of and for the said defendant. And the defendant further saith, that although the plaintiff did, before the commencement of this suit, to wit, on &c., deliver unto the defendant a bill of the plaintiff's fees, charges and disbursements for and in respect of the said work, labour, &c. and of the said monies so paid and disbursed as aforesaid, subscribed with the proper hand of the plaintiff, according to the statute in such case made and provided, yet a month from such delivery had not before the commencement of this suit expired. And the defendant further saith, that the plaintiff did not at any other time before the commencement of this suit deliver unto the defendant, or send by the post to or leave for him at his counting-house, office of business, dwelling-house, or last known place of abode, any other bill of the plaintiff's fees, charges and disbursements, for or in respect of the said work, care, labour, &c., and of the said monies so paid and disbursed as aforesaid, or any of them, subscribed with the proper hand of the plaintiff according to the statute in such case made and provided. And this the defendant is ready to verify, &c.

ACTION PREMATURELY BROUGHT.

II. PLEAS ADMITTING THAT THERE *WAS* CAUSE OF ACTION BUT AVOIDING IT BY SHOWING SUBSEQUENT MATTER.

1. PLAINTIFF A BANKRUPT OR INSOLVENT.

PLAINTIFF A BANKRUPT OR INSOLVENT.

And the defendant, by Y. Z., his attorney, saith, that before and at the time of the making of the said promises in the said declaration mentioned, to wit, on, &c., and from thence continually until and after the time of issuing the fiat in bankruptcy hereinafter mentioned, the plaintiff was a [dealer and chapman (*c*)], and a trader within and subject to the statutes then in force concerning bankrupts; and as such trader, heretofore, to wit, on &c. [*any day just before the act of bankruptcy, but the day is not material,*] became and was indebted to A. B., a subject of this realm, in the sum of £100 [*or if the fiat was under the 5 & 6 Vict. c. 122,* "£50,"] and upwards, for a true and just debt: And thereupon the plaintiff so being such trader, and being and continuing so indebted, he heretofore, to wit, on &c. became and was a bank-

Plaintiff's bankruptcy before action. (*b*)

Plaintiff a trader.

The petitioning creditor's debt.

Plaintiff commits an act of bankruptcy.

(*b*) 6 G. 4, c. 16; 1 & 2 W. 4, c. 56; 5 & 6 Vict. c. 122; and see form of this plea in *Guiness* v. *Carroll*, 2 Man. & Ry. 152; and a plea of the bankruptcy of one of several plaintiffs, *Dean* v. *James*, 1 Adol. & Ellis, 809; 1 Nev. & Man. 392, S. C. Before the Pleading Rules Hil. T. 4 W. 4, the plaintiff's bankruptcy might have been given in evidence under the plea of non-assumpsit, when it had accrued before the commencement of the action; see 7 T. R. 396; Bul. N. P. 153; 15 East, 622; 3 Camp. 236. But now it is otherwise, and all the proceedings should be stated in the plea; 1 Bos. & P. 448; 7 East, 53; 8 T. R. 140; 1 Wentw. 308. As to what rights of action pass to the assignees of a bankrupt, see *Drake* v. *Beckham*, in error, 11 M. & W. 315, and the cases cited there, and in the argument and judgment in the Court below, 8 M. & W. 846. The proceedings should in all cases be set forth according to the facts.

(*c*) As to the persons who are "traders," see 6 Geo. 4, c. 16, s. 2; and 5 & 6 Vict. c. 122, s. 10.

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rupt within the true intent and meaning of the statutes in that case made and provided: And thereupon afterwards, to wit, on &c. [*date of fiat*], the Right Honourable ——, then being Lord High Chancellor of Great Britain,

The fiat in bankruptcy issued against plaintiff.

upon reading the petition made to him by the said A. B. against the plaintiff and the said A. B. having made such affidavit and given such bond as by law are required [*or, if the bond was dispensed with, say,* "and the said A. B. having made such affidavit as by law is required, and the said Lord Chancellor having dispensed with the bond of the said A. B." (*d*)], duly made and issued his the said Chancellor's fiat in bankruptcy under his hand, and directed to her Majesty's Court of Bankruptcy; (*e*) [*or, in the case of a country fiat, under the 5 & 6 Vict. c. 122,* "directed to the Court of Bankruptcy in the (Leeds) district, in the county of (York),"] and whereby the said Lord Chancellor then authorized the said A. B. to prosecute his said complaint in her said Majesty's Court of Bankruptcy in London [*or,* "in the said District Court of Bankruptcy"]; as by the said fiat duly filed and entered of record and now in the said Court of Bankruptcy in London, and being a record of the said Court of Bankruptcy in London, reference being thereunto had, will fully appear. (*f*) [*If the fiat was after the 5 & 6 Vict. c. 122, add,* "And the said fiat was forthwith issued and transmitted by the Lord Chancellor's secretary of bankrupts to her Majesty's said Court of Bankruptcy," (*g*) *or,* "to the said District Court of Bankruptcy."] By

Plaintiff duly found a bankrupt by E. F. one of the Commissioners of Court of Bankruptcy. (*h*)

virtue of which said fiat, and by force of the statute in such case made and provided, E. F. Esquire, then being a Commissioner of her said Majesty's Court of Bankruptcy [*or,* "a Commissioner of the said *Leeds* District Court of Bankruptcy"], and appointed by virtue of the statute in that case made and provided, and having duly taken the oath in the presence of the Lord High Chancellor as prescribed and appointed to be taken by Commissioners of Bankruptcy according to the said statute, afterwards, to wit, on &c. did in due form of law find and adjudge that the plaintiff had become a bankrupt according to the true intent and meaning of the statute in that behalf concerning bankrupts, before the issuing of the said fiat, and did thereupon

Reference to that adjudication

adjudge and declare him to be a bankrupt accordingly; as by the said adjudication now remaining of record in the said Court of Bankruptcy, reference being thereunto had, will fully appear: [*if a country fiat, omit last sentence, and add* "and afterwards, to wit, on the same day and year last aforesaid, being the date of the said adjudication, the said E. F., so being such commissioner as aforesaid, duly made a minute of the said adjudication, (*i*) and the same was transmitted by the said District Court of Bankruptcy to the Court of Bankruptcy in London; as by the said minutes of adjudication now remaining of record in the said Court of Bankruptcy in London,

Appointment of G. G. as official assignee. (*k*)

reference being thereunto had, will fully appear:" (*j*)] And the defendant further saith, that before and at the time of the making of the said adjudication, one G. G. was and from thence hitherto hath been and still is one of

(*d*) See 5 & 6 Vict. c. 122, s. 3.
(*e*) Examine carefully with the fiat in the particular case, and if the other proceedings are not entered of record leave out the references to them as matter of record.
(*f*) As to this allegation, see 1 & 2 W. 4, c. 56, s. 13.
(*g*) See 5 & 6 Vict. c. 122, s. 4.
(*h*) One commissioner has power to act, see 1 & 2 W. 4, c. 56, s. 7; 5 & 6 W. 4, c. 29, s. 25; 5 & 6 Vict. c. 122, s. 59.
(*i*) *Ibid.* s. 23.
(*j*) *Ibid.* s. 47.
(*k*) As to the appointment of the official assignee, see 1 & 2 W. 4, c. 56, s. 22; 5 & 6 Vict. c. 122, s. 48.

the official assignees of the said [District] Court of Bankruptcy, and duly nominated and appointed by the Lord High Chancellor of England, according to the statute in that case made and provided: And the defendant further says, that afterwards [and before the commencement of this suit], to wit, on &c., the said E. F. so being such commissioner as aforesaid, by writing under his hand, appointed the said G. G. to be the official assignee of the estate and effects of the said plaintiff under the said fiat, to act with the assignee or assignees to be thereafter chosen by the creditors of the said bankrupt, as by the memorandum of the said appointment now remaining of record in the said Court of Bankruptcy, reference being thereunto had, will more fully appear: [*if under the 5 & 6 Vict. add*, "and thereupon and before notice of the said adjudication was given in the London Gazette, as hereinafter mentioned, and before putting in execution any warrant of seizure granted upon such adjudication, a duplicate of such adjudication was served on the plaintiff personally, [*or* 'left at the usual place of abode,' *or* 'place of business of the said plaintiff,' *according to the fact*(*l*)], and the defendant further saith, that the plaintiff did not within or before the expiration of five days from the service of such duplicate on him as aforesaid show cause to the satisfaction of the said [District] Court of Bankruptcy for the annulling of such adjudication as aforesaid; and thereupon and after the expiration of such time as aforesaid, to wit, on &c. the said [District] Court of Bankruptcy caused notice of such adjudication to be given in the *London Gazette*, and thereby appointed two public sittings of the said Court to be holden at &c., for the plaintiff to surrender and conform, the last of which sittings was appointed for and on a day not less than thirty days and not exceeding sixty days from such advertisement, to wit, the —— day of ——, and which said last-mentioned day was the day limited for such surrender of the plaintiff, and the plaintiff was thereby required to surrender himself to E. F. &c., on &c.:"] And the defendant further saith, that the said commissioner did afterwards, to wit, on &c., cause a certain notice to be given and published in the London Gazette, whereby, after reciting that a fiat in bankruptcy had been awarded and issued forth against the plaintiff, and that he had been declared a bankrupt, he the plaintiff was required to surrender himself to E. F. Esquire, a commissioner of her Majesty's Court of Bankruptcy, on &c., at eleven of the clock in the forenoon precisely, at the Court of Bankruptcy in Basinghall Street, in the City of London, and make a full discovery and disclosure of his estate and effects, when and where the creditors of the plaintiff were to come prepared to prove their debts, and at the first sitting to choose assignees, and at the last sitting the plaintiff was required to finish his examination, and his said creditors were to assent to or dissent from the allowance of his certificate: And the defendant further saith, that the said first meeting was duly holden at the time and place so appointed, and that at the said first of the said meetings, to wit, on &c., aforesaid, at the [District] Court of Bankruptcy aforesaid, he, the plaintiff, then remaining and continuing a bankrupt, G. R. M., of &c., was nominated and chosen by the major part in value of the creditors of the plaintiff, who had under the said fiat proved their debts to be £10 and upwards, to be assignee of the estate and effects

PLAINTIFF A BANKRUPT OR INSOLVENT.

The Commissioner appoints G. G. *official* assignee to act with the assignee to be chosen by the creditors.

Reference to memorandum of such appointment.

Commissioner's notice in Gazette of &c. and of meeting to choose assignees. (*m*)

First meeting and choice of the creditors' assignee.

(*l*) See 5 & 6 Vict. c. 122, s. 23. (*m*) See that the notice is correctly set forth.

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of the plaintiff: And afterwards, and before the commencement of this suit, to wit, on &c., the said E. F. so being such commissioner as aforesaid, approved of and ratified and confirmed the said choice, and appointed the said G. R. M. assignee of the said estate and effects accordingly: And afterwards, and before the commencement of this suit, to wit, on &c., last aforesaid, the said G. R. M. accepted the said trusts and appointment, as by the memoranda of the said nomination and choice and of the said appointment and of the said acceptance of the said trusts and appointment now respectively remaining of record in the said Court of Bankruptcy [in London], reference thereunto respectively being had, fully appear: By reason of which said premises and by force of the statute in such case made and provided, the said G. G. and G. R. M. then and after the said supposed causes of action accrued, and before the commencement of this suit, became and were and are assignees of the estate and effects of the plaintiff as such bankrupt, and entitled to the said debts, sums of money, and causes of action in the said declaration mentioned, and each and every of them. And this the defendant is ready to verify, &c. [*Counsel's signature.*]

The Commissioner confirms such choice.

The assignee accepts the appointment.

Reference to the proceedings.

Whereby the official assignee and the creditors' assignee became assignees, and are entitled to the debt in question.

Plea that the plaintiff was twice bankrupt, and that under the second fiat or commission he obtained his certificate, but did not pay fifteen shillings in the pound, whereby the right of action vested in the assignees.

See 6 Geo. 4, c. 16, s. 127, and *Young* v. *Rishworth*, 8 A. & E. 470.

Similar plea of the bankruptcy of the drawer of a bill of exchange in an action by the indorsee against the acceptor.

See *Mackay* v. *Wood*, 7 M. & W. 420.

Plea of plaintiff's bankruptcy and demand by and payment to the assignees.

See *Sievers* v. *Boswell*, 3 M. & G. 524.

Plea of plaintiff's discharge under Insolvent Act, 1 & 2 Vict. c. 110. (*h*)

And the defendant, by Y. Z. his attorney, says, that after the making of the said several promises, and accruing of the said causes of action in the

(*h*) Section 35 enacts, "that from and after the time appointed for the commencement of this act, it shall be lawful for any person who shall be in actual custody within the walls of any prison in that part of the united kingdom called England, upon any process whatsoever, for or by reason of any debt, damages, costs, sum or sums of money, or for or by reason of any contempt of any Court whatsoever for non-payment of any sum or sums of money, or of costs, taxed or untaxed, either ordered to be paid, or to the payment of which such person would be liable in purging such contempt, or in any manner in consequence or by reason of such contempt, at any time within the space of fourteen days next after the commencement of the actual custody of such prisoner, whether such commencement shall have been in the same prison, or in any other prison, or the rules or liberties of any prison, or afterwards, if the said Court shall in any case think reasonable to permit the same, to apply by petition in a summary way to the said Court for the Relief of Insolvent Debtors for his discharge from such custody, according to the provisions of this act; and in such petition shall be stated the time and place of the first arrest of such prisoner in the cause or causes wherein he shall then be detained, and the time of his commitment to the prison where he shall then be confined; and if such prisoner shall not have been in the same custody from the time of such first arrest, then the means and manner by which the change of custody of such prisoner has taken place, and also the name or names of the person or persons at whose suit or prosecution such prisoner shall at the time of presenting such petition be detained in custody, and the amount of the debt or debts, sum or sums of money, and of such costs as aforesaid, so far as the amount of such costs is ascertained, for which he shall be so detained; and such prisoner shall in such petition state whether such prisoner has given notice to the keeper of the gaol or prison in which he shall be confined of his intention to present the said petition, which notice the said prisoner is hereby required to give in writing to the keeper of such gaol or prison; and such prisoner shall in such petition state that he is willing that all his real and personal estate and effects shall be vested in the provisional assignee for the time being of the estates and

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declaration mentioned, and before the commencement of this suit, to wit, on the —— day of ——, A.D. ——, the plaintiff, then being a person in actual custody within the walls of one of her majesty's prisons in that part of the united kingdom called England, to wit, [the Queen's Prison], upon process, for and by reason of a certain debt [and costs] at the suit of one G. H. [*or* " for or by reason of contempt of the Court of ——, for non-payment of a certain sum of money ordered by the said Court to be paid by the plaintiff," *according to the fact,*] did within fourteen days next after the commencement of the said actual custody of the now plaintiff [*or* " by the permission of the Court for the Relief of Insolvent Debtors hereinafter mentioned,"] to wit, on the day and year last aforesaid, duly, and according to the directions and provisions of the statute made and passed in the session of parliament holden in the first and second years of the reign of our lady the now queen, intituled " An Act for abolishing Arrest on Mesne Process in Civil Actions except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England," apply by petition in a summary way to the Court for Relief of Insolvent Debtors in the said act mentioned, for his discharge from such custody, according to the provisions of the said act; in which petition was stated the time and place of the first arrest of the plaintiff in the cause wherein he was then detained, and the time of his commitment to the prison where he was then confined, and also the name of the person at whose suit [*or* " prosecution "] the plaintiff, at the time of presenting the said petition, was detained in custody, and the amount of the debt [*or* " debt and costs," *or* " sum of money," *or* " costs," " so far as the amount of such costs was ascertained,"] for which he was so detained, and in which petition the plaintiff also stated that he had given notice to the keeper of the said prison [*or* " gaol"] in which he was confined of his intention to present the said petition, which notice the plaintiff did give in writing to the keeper of the said prison [*or* " gaol"]; and in which petition the plaintiff also stated that he was willing that all his real and personal estate and effects should be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, according to the provisions of the said act, and

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effects of insolvent debtors in England according to the provisions of this act, and shall pray to be discharged from custody, and to have future liberty of his person against the demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be or claim to be creditors of such prisoner at the time of presenting such petition; which petition shall be subscribed by the said prisoner, and shall forthwith be filed in the said Court."

In *Tucker* v. *Webster*, 10 M. & W. 371; 1 Dowl. N. S. 960, S. C., the plaintiff's discharge under this act was pleaded more concisely. Instead of alleging compliance, as in the form in the text, with all the requisites of the statute, the plea averred that the petition " was then duly subscribed by the plaintiff, and contained all such matters and things as are required by the said act, and was afterwards, to wit, &c., filed in the said Court, pursuant to the directions in the said act contained." And although the plea was specially demurred to on several grounds, no objection was taken on the ground of its conciseness; and, *semble*, such a plea is sufficient.

Where to an action on a covenant of indemnity against the payment of money, the defendant pleaded, that before the plaintiff was called upon to pay the money, he was discharged under the Insolvent Act, but did not insert the sum in his schedule, and that his liability to pay it arose from his wrongful omission; the plea was held bad, and that the plaintiff was entitled to judgment non obstante veredicto; *Allard* v. *Kimberly*, 1 D. & L. 635.

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prayed to be discharged from custody, and to have future liberty of his person against the demands for which the plaintiff was then in custody, and against the demands of all other persons who should be or claim to be creditors of the plaintiff at the time of presenting the said petition, and which said petition was duly subscribed by the plaintiff, and was forthwith, to wit, on the day and year last aforesaid, filed in the said Court, pursuant to the directions in the said act contained; and the defendant further says, that upon the said filing of the said petition by the plaintiff, and before the commencement of this suit (*i*), to wit, on the day and year last aforesaid, the said Court, in pursuance and according to the said statute, ordered that all the real and personal estate and effects of the plaintiff, both within this realm and abroad, except the wearing apparel, bedding, and other such necessaries of the plaintiff and his family, and the working tools and implements of such prisoner, not exceeding in the whole the value of twenty pounds, and all the future estate, right, title, interest and trust of the plaintiff in or to any real or personal estate and effects within this realm or abroad, which the plaintiff might purchase, or which might revert, descend, or be devised or bequeathed or come to him before he should become entitled to his final discharge in pursuance of the said act, and according to the adjudication made in that behalf; or in case the plaintiff should obtain his full discharge from custody without any adjudication being made by the said Court, then, before the plaintiff should be fully discharged from custody, and all debts due or growing due to the plaintiff, or to be due to him before such discharge as aforesaid, should be vested in one Samuel Sturgis, then and still being the provisional assignee for the time being of the estates and effects of insolvent debtors in England, duly appointed thereto by the said Court for the Relief of Insolvent Debtors, which said order was then duly entered of record in the said Court, as by the said order, reference being thereunto had, will more fully appear; and notice of the said order was duly published according to the directions of the said Court; by virtue of which said order of the Court, so made as aforesaid, and by virtue of the said statute, the said debts and sums of money in the declaration mentioned became and were vested in the said Samuel Sturgis, as such provisional assignee as aforesaid. And the defendant further says, that after the making of the said vesting order, and before the commencement of this suit, to wit, on the —— day of ——, A.D. ——, a certain person, to wit, one C. M., was duly appointed by the said Court assignee of the estate and effects of the plaintiff for the purposes of the said act, and the said C. M. then accepted and signified to the said Court his acceptance of the said appointment, which said appointment was then, and after such acceptance thereof by the said G. M., entered of record of the said Court, as by the said appointment, reference being thereunto had, will more fully appear; and notice thereof was duly published according to the directions of the said Court; and thereupon, by virtue of the said appointment, and the said acceptance thereof by the said C. M., and by virtue of the said statute, the said debts, sums of money, and causes of action in the declaration mentioned, became and were

(*i*) The plea must aver that the vesting order was made before the commencement of the suit; *Tucker* v. *Webster*, 10 M. & W. 371; 1 Dowl. N. S. 960, S. C.

and now are vested in the said C. M. as such assignee as aforesaid (*j*). And this the defendant is ready to verify, &c.

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Plea of the plaintiff's discharge under 5 & 6 Vict. c. 116. (*k*)

And for a further plea in this behalf, the defendant says that after the accruing of the said debts and causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on the —— day of ——, A. D. ——, the plaintiff not being a trader within the meaning of the statutes in force relating to bankruptcy at the time of the making and the passing of the act of parliament hereinafter mentioned, (*l*) [*or, if such were the case,* "being a trader within the meaning of the statutes in force relating to bankrupts at the time of the making and passing of the act of parliament hereinafter mentioned, but owing debts amounting in the whole to less than three hundred pounds"], gave notice according to the schedule annexed to a certain act of parliament made and passed in the sixth year of the reign of her present Majesty, intituled, "An Act for the Relief of Insolvent Debtors," to one-fourth in number and value of his creditors, and caused the same notice to be inserted twice in the London Gazette, and twice in a certain newspaper circulating within the county where the plaintiff resided, to wit, in the —— (*name of the newspaper*), and thereupon afterwards, to wit, on the —— day of ——, A. D. ——, he the said plaintiff having resided twelve calendar months in London [*or,* "within the London district," *or, if within any other district,* "within the district of ——"], presented a petition for protection from process to the Court of Bankruptcy [*or,* "to A. B., the commissioner of bankrupt, within whose district the said plaintiff had resided twelve calendar months as aforesaid"], which said petition had annexed to it a full and true schedule of his the said plaintiff's debts, with the names of his creditors and the dates of contracting the debts severally, the nature of the debt and the security (if any) given for the same, and also of the nature and amount of his the said plaintiff's property, and of the debts owing to him with their dates, and the names of his debtors and the nature of the securities (if any) which he had for such debts, [and, *if such were the fact,* which petition also set forth a certain proposal which he the said plaintiff then made for the payment of the whole [*or,* "in part"] of his said debts.](*m*) And the defendant further says, that the said petition and schedule were duly filed of record in this Court and that thereupon afterwards, to wit, on the —— day

(*j*) The assignee of an insolvent debtor, on his acceptance of the appointment, has vested in him all the estate of the insolvent from the date of the vesting order, *Yorke* v. *Bunn*, 10 M. & W. 78; 2 Dowl. N. S. 283, S. C.; and all debts due and growing due up to the time of the plaintiff's discharge vest in the assignee, *Ford* v. *Dobbs*, 2 Dowl. N. S. 877, where see form of plea.

(*k*) As to this plea, see sects. 1, 4 and 7 of the above statute. The 7 & 8 Vict. c. 96, s. 1, enacts "That a petition for protection from process under the 5 & 6 Vict. c. 116, may be presented to any Court or District Court of Bankruptcy within the district of which the petitioner may have resided twelve calendar months, without any notice whatever being given to any creditor, or in the London Gazette or any newspaper, so that if the petition were presented after the passing of that statute, this part of the plea may be omitted.

(*l*) The sixth section of 7 & 8 Vict. c. 96, empowers any person in execution upon any judgment obtained in any action for the recovery of any debt, either not being a trader within the meaning of the statutes relating to bankrupts, or being a trader within the meaning of the said statutes, owing debts amounting, in the whole, to less than £300, to petition for protection from process.

(*m*) If the petition was presented after the passing of the 7 & 8 Vict. c. 96, it will be proper to state that it was in the form specified in the schedule annexed to that act, and that the petition and schedule were verified by affidavit, pursuant to the second section of the statute.

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of ——, in the year last aforesaid, the said A. B. being the commissioner appointed by the Court of Bankruptcy to hear the matters of such petition, and to whom the same was referred [*or, if in the country,* "being the commissioner to whom the said petition was presented"], gave due notice (*n*) to the creditors of the said plaintiff that on the —— day of ——, A. D. ——, he should proceed to examine upon oath the said plaintiff, being such petitioner as aforesaid, and any creditor who might attend such examination, and any witness whom the plaintiff or any creditor might call, [*if any adjournment took place, state it,*] and it then appearing to the said commissioner that the allegations in the said petition and the matters in the schedules were true, and that the debts of the plaintiff were not contracted by any manner of fraud or breach of trust, or any prosecution against the said plaintiff whereby he had been convicted of any offence, or without having at the time of becoming indebted reasonable assurance of being able to pay the debts, and that such debts were not contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat of bankruptcy, or malicious trespass, and that the plaintiff had made a full discovery of his estate, effects, debts and credits, and had not parted with any of his property since the presenting of his petition, he the said A. B. being such commissioner as aforesaid, afterwards, to wit, on the —— day of ——, A. D. ——, caused notice to be given that on the —— day of ——, A. D. ——, he would proceed to make an order unless cause were shown to the contrary, which order should be called a final order, and should be for the protection of the person of the plaintiff from all process, and for vesting of his estate and effects in an official assignee to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who might attend before the said A. B. on such day [*or, if any proposal were made,* "for carrying into effect such proposal as the plaintiff set forth in his said petition as aforesaid"], and the defendant further says, that heretofore and before the commencement of this suit, to wit, on &c. the said A. B. named and appointed C. D. (one of the official assignees named by the Lord High Chancellor, pursuant to the statute in such case made and provided) to be the official assignee of the estate and effects of the plaintiff, and E. F. was then duly chosen by the majority in number and value of the creditors of the plaintiff attending before the said A. B. on the said —— day of ——, A. D. ——, assignee of the estate and effects of the plaintiff; and afterwards, to wit, on the day and year last aforesaid, a final order was made and passed by the said A. B. for the protection of the person of the plaintiff from all process, and for the vesting of his estate and effects in the said C. D. and E. F., whereby, from and after the passing thereof, the whole estate, present and future, as well real as personal, and all the effects and all the credits of the plaintiff became absolutely vested in the said C. D. as such official assignee as aforesaid, and the said E. F. as such assignee chosen by the creditors in manner aforesaid, and by reason of which premises the said C. D. and E. F. became and were entitled to the said debts, sums of money and causes of action in the declaration mentioned, and each and every of them. And this the defendant is ready to verify, &c.

(*n*) As to this notice since the 9th August, 1844, see the third section of the 7 & 8 Vict. c. 96, s. 3.

See *Swann* v. *Sutton*, 2 P. & D. 533.

Plea that the plaintiff took the benefit of the Insolvent Act after the commencement of the action.

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2. DEFENDANT A BANKRUPT OR INSOLVENT.

Plea of defendant's bankruptcy and certificate before action commenced. (*l*)

And the defendant, by Y. Z. his attorney, [*or* "in person,"] says, that after the making of the said promises, [*or in debt* "after the said debts were contracted," (*m*)] to wit, on the —— day of ——, A. D. ——, [*usually the date of the certificate, but the day is immaterial,*] he the defendant became a bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts; and that the alleged causes of action in the said declaration mentioned and each of them accrued to the plaintiff before the defendant so became a bankrupt. (*n*) And of this the defendant puts himself upon the country, &c. (*o*)

Plea of defendant's bankruptcy and certificate *after* the commencement of the action. (*p*)

And the defendant, by Y. Z. his attorney, says, that the plaintiff ought not *further* (*q*) to maintain his action, because he saith that after the making of the said promises in the said declaration mentioned, and after the accruing of the said causes of action therein mentioned, *and after the commencement of this suit*, to wit, on &c. he the defendant became a bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts; and that the alleged causes of action in the said declaration mentioned and each

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(*l*) This plea is given by 6 Geo. 4, c. 16, s. 126, see the terms of that enactment, and *Charlton* v. *King*, 4 Term Rep. 156; *Sheen* v. *Garrett*, 6 Bing. 686; 9 East, 82. The above form is proper even if the certificate were obtained after declaration, provided it were obtained before plea; *Tower* v. *Cameron*, 6 East, 413; *Harris* v. *James*, 9 East, 82. But if the certificate was not allowed until after the defendant had been obliged to plead, then his only course is to wait until it is perfect, and then to plead the proceedings specially, and showing that the certificate was obtained pending the suit, as in the form, *post*, "*Pleas of Defences pending Suit*;" *Todd* v. *Maxfield*, 6 Bar. & Cres. 105; 9 Dowl. & Ry. 171, S. C. This short form cannot be adopted in a plea of the bankruptcy of a third party, but only in the case of the *defendant's* bankruptcy; *Pitt* v. *Chappelow*, 8 M. & W. 616. Where A., the execution creditor of B., discharged B. out of custody upon his executing a warrant of attorney to secure the payment of the debt by instalments, and upon C.'s signing an undertaking, whereby, in consideration of A.'s discharging B. out of custody in the action, C. undertook that B. should pay the debt, together with interest, by instalments, and a fiat was afterwards granted against C., under which he was declared a bankrupt and obtained his certificate; it was held that the certificate was no bar to an action against C. for an instalment accruing after the fiat, as *there was no debt due from the bankrupt* at the issuing of the fiat which could have been proved under it; *Lane* v. *Burghart*, 3 M. & G. 597. In an action against a banking company sued in the name of one of their public officers, the latter cannot plead his bankruptcy; *Steward* v. *Dunn*, 11 M. & W. 63.

(*m*) It is not necessary to aver "before the commencement of the suit;" *Tower* v. *Cameron*, 6 East, 418; 9 East, 82.

(*n*) This allegation is necessary, and will be proper, though the cause of action was not complete before the act of bankruptcy; 4 T. R. 156; 5 B. & Ald. 17. This will suffice in an action by a surety against a bankrupt, though the payment was made afterwards; 5 B. & Ald. 17.

(*o*) The plea is to conclude to the country, 1 P. Wms. 258, 259; 10 Mod. 160, 247; and the plaintiff cannot reply specially, 2 M. & S. 549; 3 Camp. 499, n. a.; S. C. 1 B. & Ald. 22; *aliter*, if the plea be special. In Q. B. the plea need not have been signed by counsel, 6 T. R. 496; but in C. P. it must have been signed by a serjeant, 3 B. & P. 171. But Reg. Gen. Hil. T. 4 W. 4, reg. 107, now orders to the contrary, viz. that no plea concluding to the country shall be signed by counsel. It must have been delivered, 2 B. & Ald. 392, even before Reg. Gen. Hil. T. 4 W. 4.

(*p*) See notes to last precedent and the form 7 Wentw. 414; and how to reply, 3 Taunt. 237. *Semble*, that the preceding form would suffice.

(*q*) As to this allegation, see 6 East, 413; 4 East, 502; 9 East, 82.

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of them accrued to the plaintiff before the defendant so became a bankrupt. And of this the defendant puts himself upon the country, &c.

Plea of defendant's bankruptcy pending action and within eight days before plea.

And the defendant, by Y. Z. his attorney, says, that the plaintiff ought not further to maintain his aforesaid action thereof against the defendant because the defendant says, that he the defendant before and on &c. [*day of act of bankruptcy or about it,*] and from thence continually, until the issuing the fiat in bankruptcy hereinafter mentioned, was a ——, (*q*) [*state what his trade was,*] and a trader, according to and within the true intent and meaning of the statute concerning and relating to bankrupts then in force. And thereupon the defendant afterwards, to wit, on the day and year last aforesaid, became and was indebted to one A. B. [*the petitioning creditor,*] a subject of this realm, in the sum of £100, [*or, if the fiat was under the 5 & 6 Vict. c. 122,* "£50,"] and upwards of lawful money, for a true and just debt due and owing from the defendant to the said A. B. [*the petitioning creditor.*] And thereupon the defendant being so indebted, and being a subject of this realm, and so using and exercising the trade and business of a ——, and so being such trader, according to the provisions of the said act, afterwards, to wit, on the same day and year last aforesaid, the said debt to the said A. B. being then due and unsatisfied, became and was a bankrupt within the true intent and meaning of the said statutes then and still in force concerning bankrupts made and provided; (*r*) and that thereupon afterwards, to wit, on &c. a certain fiat of bankruptcy upon the petition of the said A. B. was duly made, signed and issued (*t*) by —— Lord High Chancellor of Great Britain, directed to her majesty's Court of Bankruptcy in London [*or, in the case of a country fiat under 5 & 6 Vict. c. 122,* " directed to the Court of Bankruptcy in the —— district, in the county of ——",] by which fiat the said Chancellor did authorise the said A. B. to prosecute his said complaint in the said Court of Bankruptcy in London, [*or* " in the said District Court of Bankruptcy,"] in that behalf, as by the said fiat duly filed and entered of record and now in the said Court of Bankruptcy in London, being a record of the said Court of Bankruptcy, (*u*) reference being thereunto had, fully appears; [*if the fiat was after the 5 & 6 Vict. c. 122, add* " and the said fiat was forthwith issued and transmitted by the Lord Chancellor's secretary of bankrupts to her majesty's said Court of Bankruptcy," *or* " to the said District Court of Bankruptcy," (*v*)] by virtue of which said fiat, and by force of the statute in such case made and provided, L. M. being one of the commissioners of the said Court of Bankruptcy in London, [*or* " a commissioner of the said —— District Court of Bankruptcy,"] afterwards, to wit, on &c. did, in due form of law, find that the defendant had become and was a bankrupt before the day of the date of suing forth of the said fiat, within the true intent and meaning of the said statutes, and did then declare and adjudge the defendant to be a bankrupt accordingly, as by the said adjudication now remaining of record in the said

Defendant a trader.

Petitioning creditor's debt.

Act of bankruptcy.

Fiat issued. (*s*)

L. M. a commissioner, find and declare defendant a bankrupt.

(*q*) See 6 Geo. 4, c. 16, s. 2; and 5 & 6 Vict. c. 122, s. 10.
(*r*) 2 M. & R. 132.
(*s*) Examine with the fiat.
(*t*) An allegation that it issued out of the Court of Chancery would be incorrect, see 3 Camp. 58.
(*u*) See 1 & 2 W. 4, c. 56, s. 13.
(*v*) 5 & 6 Vict. c. 122, s. 4.

Court of Bankruptcy in London, reference being thereunto had, will appear; And afterwards, ["and before the commencement of this suit,"] to wit, on &c., being the date of the said adjudication, the said L. M. so being such commissioner as aforesaid, duly made a memorandum of the said adjudication, ["and the same was transmitted by the said District Court of Bankruptcy to the Court of Bankruptcy in London,"] as by the said memorandum now remaining of record in the said Court of Bankruptcy, reference being thereunto had, will more fully appear; and the defendant further says, that Y. Z. then was and from thence hitherto hath been and still is one of the official assignees of the said [District] Court of Bankruptcy, and duly nominated and appointed by the Lord High Chancellor of England, according to the statute in that case made and provided; and the defendant further says, that afterwards, to wit, on &c. he then remaining and continuing a bankrupt, the said L. M. so being such commissioner as aforesaid, by writing under his hand appointed the said Y. Z. to be the official assignee of the estate and effects of the defendant under the fiat to act with the assignee or assignees to be thereafter chosen by the creditors of the said bankrupt, as by the memorandum of the said appointment now remaining of record in the said Court of Bankruptcy, reference being thereunto had, will more fully appear; [*if under 5 & 6 Vict, add* "and thereupon and before notice of the said adjudication was given in the London Gazette as hereinafter mentioned, and before putting in execution any warrant of seizure granted upon such adjudication, a duplicate of such adjudication was served on the defendant,"] and the defendant further saith, that the said commissioner did then, to wit, on &c. aforesaid, [*or* "after the expiration of five days from the service of such duplicate as aforesaid, to wit, on &c."] cause a certain notice to be given and published in the London Gazette, whereby after reciting [*set out notice*] that a fiat in bankruptcy had been awarded and issued forth against the defendant, and that he had been declared a bankrupt, he the defendant was required to surrender himself to L. M., Esquire, a commissioner of her majesty's Court of Bankruptcy, [*or* "District Court of Bankruptcy,"] on &c. at eleven of the clock in the forenoon precisely, at the Court of Bankruptcy in Basinghall Street, in the City of London, [*or* "at the Court of Bankruptcy in —— Street in the town of ——, in the county of ——,"] and make a full discovery and disclosure of his estate and effects, when and where the creditors of the defendant were to come prepared to prove their debts, and at the first sitting to choose assignees, and at the last sitting the defendant was required to finish his examination, and his said creditors were to assent to or dissent from the allowance of his certificate. And the defendant further saith, that the said several meetings were duly appointed for his surrendering himself and making a full disclosure and discovery of his estate and effects and finishing his examination under the said fiat, according to the form of the said statute in that case made and provided; and that the defendant on the said &c., at the place so appointed in that behalf, duly surrendered himself to the said L. M. so being such commissioner as aforesaid, and duly signed and subscribed such surrender, and submitted himself to be from time to time examined touching the disclosure and discovery of his estate and effects. And at the last of the said meetings, to wit, on the said &c. at the place so appointed in that behalf, the defendant finished his examination

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Reference to adjudication.

Memorandum thereof made.

Reference to same.

The commissioner appoints Y. Z. *official* assignee.

Reference.

Commissioner's notice in Gazette of, &c. and of meeting to choose assignees, and for defendant to surrender.

Defendant duly surrenders.

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Defendant's conformity.

upon oath before the said commissioner: and the defendant upon such his examination made a full disclosure and discovery of his estate and effects. And the defendant further saith, that he hath always from the time of the issuing of the said fiat hitherto in all things conformed himself to the statutes concerning bankrupts, and that he the defendant, having so duly surrendered and in all things conformed himself to the said statutes at the time of the issuing of the said fiat in force concerning bankrupts, afterwards, to wit, on the —— day of ——, A. D. —— [*date of application*], the said defendant applied to the said Court [*or*, "District Court"] of Bankruptcy, to appoint a public meeting for the allowance of a certificate of conformity to the defendant as such bankrupt as aforesaid, and that afterwards, to wit, on the —— day of ——, A. D. ——, the said Court [*or* "District Court,"] of Bankruptcy appointed the —— day of ——, A. D. ——, for the allowance of the said certificate to the said defendant as such bankrupt as aforesaid, and then, to wit, on the said —— day of ——, A. D. ——, the said Court [*or*, "District Court,"] of Bankruptcy appointed a public sitting of the said Court for the allowance of the said certificate to the said defendant as such bankrupt as aforesaid, to be holden at —— [*state the place*], on the —— day of —— [*state the day*], pursuant to the statute in that case made and provided, of which said last mentioned public sitting twenty-one days' notice was given in the London Gazette, and to the solicitor to the assignees, according to the statute in that case made and provided; and the said Court [*or*, "District Court,"] of Bankruptcy having regard to the conformity of the defendant as such bankrupt as aforesaid, and to his conduct as a trader before as well as after his bankruptcy, afterwards and after the last pleading in this cause, to wit, on the —— day of ——, A. D. ——, found the said defendant as such bankrupt as aforesaid entitled to the said certificate of conformity, and then allowed the same, and the said Court afterwards, and after the last pleading in this cause, to wit, on the —— day of ——, A. D. ——, in writing, under hand and seal, certified to the Court of Review that the said defendant as such bankrupt had made a full discovery of his estate and effects, and in all things conformed to the laws relating to bankrupts, and that there did not appear any reason to doubt the truth or fulness of such discovery, and the said defendant as such bankrupt, afterwards and after the last pleading in this cause, to wit, on &c. made oath, in writing, that the said certificate was obtained fairly and without fraud, and the allowance of the said certificate was after such oath was made, and after the last pleading in this cause and before this day, to wit, on the —— day of ——, confirmed by the Court of Review, pursuant to the statute in that case made and provided. (*v*) And the defendant further saith, that the said several causes of action in the declaration mentioned accrued and each and every of them did accrue to the plaintiff before the defendant so became a bankrupt as aforesaid. And this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought further to maintain his action thereof against him the defendant.

(*v*) See 5 & 6 Vict. c. 122, s. 39, and see last edition for the form applicable to proceedings before this act.

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State the bankruptcy as in the preceding form, to the end of the allowance of the certificate, and then proceed as follows:]—And the defendant further saith, that before the issuing the said fiat of bankruptcy, and also before the defendant had committed any act of bankruptcy, the plaintiffs had become and were liable for certain debts of the defendant upon and by reason of the said several bills of exchange in the said first count mentioned, and which said several bills of exchange had been and were before then respectively drawn by the defendant and accepted by the plaintiff for the accommodation of the defendant, and had been and were before then respectively negotiated by the defendant, and at the time of the issuing of the said fiat respectively were and remained in the hands of divers persons, being respectively creditors of the defendant. And the defendant further saith, that afterwards, and before any dividend had been made under the said fiat, to wit, on &c. [*day of proof of debts or about it*], the said several debts had been and were respectively proved under the said fiat by the respective holders of the said several bills of exchange, being creditors of the defendant as aforesaid, that they the plaintiffs, so being liable as aforesaid, after the issuing of the said fiat, and after the said debts had been respectively proved as aforesaid, to wit, on &c., paid the said several debts for which they were so liable as aforesaid to the respective holders of the said several bills of exchange, so being creditors of the defendant as aforesaid. *And the* defendant further saith, that the said creditors who had not proved *their* debts under the said fiat could and yet may receive under the said fiat a dividend equally in proportion to their respective debts, without disturbing any dividends already made under the same commission. And this the defendant is ready to verify, &c.

Bankruptcy under 6 Geo. 4, c. 16, s. 52, that before the issuing of the commission plaintiff had accepted an accommodation bill drawn by defendant, and that afterwards, and before dividend, the holder had proved under defendant's commission, and that plaintiff, the acceptor, afterwards paid, and could have benefit of proof. (*x*)

And for a further plea in this behalf as to £——, parcel of the money in the [first count] mentioned, the defendant says &c., [*set out the defendant's bankruptcy, the issuing of the fiat, the adjudication, and other proceedings, down to the allowance and confirmation of the certificate, and proceed as follows:*] And the defendant further says, that the said sum of £——, parcel &c., is claimed and alleged by the plaintiff to be due and is sought to be recovered in this action as so much money due to the plaintiff, as such surviving executor as aforesaid, for money paid for the use of the defendant by the plaintiff as such surviving executor, in discharge of a certain debt of the defendant due to certain persons united in copartnership for the purpose of carrying on the trade and business of bankers in England, and called The Northern and Central Bank of England; and that the said sum of £—— is not due, nor is any part thereof due, nor is the same or any part thereof claimed or alleged by the plaintiff to be due or sought to be recovered in this action on any other ground or account or in any other manner whatsoever. And the defendant further says, that the said debt so due to the said Northern and Central Bank of England as aforesaid was a debt of the defendant to and for which the said E. H. deceased had become and was liable in his lifetime, and before the defendant became a bankrupt as aforesaid, and before the issuing of the said fiat as aforesaid, to wit, on the —— day of ——, A. D. ——; and to

To assumpsit for money paid by the plaintiff as surviving executor, plea of the defendant's bankruptcy and certificate, and that the money was paid for a debt of the defendant, for which the plaintiff was surety; that the debt was due and plaintiff liable for it before the bankruptcy, and that the money was paid without any request from the defendant, except such as might legally arise from the premises; and that the surety had not, when

(*x*) As to this defence see 5 B. & Ald. 14; 12 East, 664, and cases there cited, and 8 Taunt. 315; 2 Moore, 326; 5 B. & Ald. 852.

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he became liable, notice of any act of bankruptcy. (z)

and for which debt E. H. remained and was liable up to the time of his death; and to and for which debt the plaintiff and L. T. as executors in the lifetime of the said L. T. became and were liable, and remained and continued so liable up to the time of the death of the said L. T.; and to and for which debt, being a debt of the said bankrupt, the plaintiff, as surviving executor of the said E. H., and by reason and in consequence only of his the said E. H. so having become and being so liable as aforesaid, became and was so liable and remained and continued so liable up to and at the time of the bankruptcy of the defendant, and of the issuing of the said fiat against him as hereinbefore mentioned. And the defendant further says, that the plaintiff, as such surviving executor as aforesaid, so being and remaining liable to the said debt of the said defendant as aforesaid, after the issuing of the said fiat, to wit, on &c., in respect of his liabilities aforesaid, paid and discharged the same debt to the Northern and Central Bank of England, without any request from the defendant, save and except the request supposed to arise by law from the premises in this plea mentioned, which is the request in the said [first count] mentioned, so far as the same relates to the said sum of £——. And the defendant further says, that the said E. H. had not, when he became so liable as aforesaid, notice of any act of bankruptcy by the defendant committed; and that the plaintiff and L. T. had not, nor had either of them, when they became liable as aforesaid, nor had the plaintiff, when he became liable as aforesaid, notice of any act of bankruptcy by the defendant committed. And the defendant further says, that the payment so made by the plaintiff to the Northern and Central Bank of England as aforesaid is the same payment so made by him as in the [first count of the] said declaration mentioned, so far as regards the said sum of £——, parcel of the money in the [first count] mentioned. And this the defendant is ready to verify, &c.

Plea of *defendant's* discharge under *Insolvent Act*, 1 & 2 Vict. c. 110. (a)

The defendant, by Y. Z. his attorney, saith, that heretofore, and before the commencement of this suit, (b) to wit, on &c. [*date of order*] by a certain order of adjudication then made by the Court for the Relief of Insolvent

(z) The certificate is a discharge from such a claim as the principal creditor might have proved, and if he had, the plaintiff would have been entitled to the benefit of that proof, either in reduction of his liability to the creditor, if the creditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor; or the plaintiff might have paid the debt at once to the creditor, and have himself proved before any dividend was declared; or if the creditor would not take the debt, the plaintiff might have compelled him to prove for the plaintiff's benefit; and therefore to this plea the plaintiff cannot reply, that before the payment the defendant had obtained his certificate, and that a final dividend had been made of his estate, and that there was not any debt in respect of which the plaintiff could have proved; *Jackson* v. *Magee*, 3 Q. B. Rep. 48; 2 G. & D. 402,

(a) Section 91 enacts, "That if any suit or action shall be brought, or any scire facias be issued against any such person, his heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognizance acknowledged by such person for the same, except as aforesaid, it shall be lawful for such person, his heirs, &c. to plead generally that such person was duly discharged according to this act by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially; whereto the plaintiff or plaintiffs shall or may reply generally, and deny the matter pleaded as aforesaid, or reply any other matter or thing which may show the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded this act, and a discharge by virtue thereof, specially." See other forms of pleas and replications of insolvent act, 6 Car. & P.

Debtors in England, held at [*the place where Court held*], he the defendant was duly discharged according to a certain act of parliament made and passed in the second year of the reign of our lady the now queen, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England," (*c*) of and from the said several promises (*d*) and causes of action, and each and every of them, in the said declaration mentioned; and the said order and discharge still remains in full force. And the defendant is ready to verify, &c.

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See form of plea and replication in *Stracey* v. *Blake*, 1 M. & W. 170.

Plea of defendant's discharge under insolvent act, and that plaintiff's debt was omitted in schedule with plaintiff's concurrence.

And for a further plea in this behalf, the defendant says, that after the contracting of the said debts and accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on &c., the defendant, not being a trader within the meaning of the statutes in force relating to bankrupts at the time of the making and passing of the act of parliament hereinafter mentioned, [*or, if such were the case*, "being a trader within the meaning of the statutes in force relating to bankrupts, at *the time* of the making and passing of the act of parliament hereinafter mentioned, but owing debts amounting in the whole to less than £300"] and

Plea of defendant's petition *and* discharge under 5 & 6 Vict. c. 116.(*e*)

666; 3 Taunt. 237; 3 Wentw. Index, xix. Id. 198; Willes, 199; Morg. 241, 244, 246; Lil. Ent. 108; Lev. Ent. 65. See a plea of defendant's discharge as an insolvent in Newfoundland, under 49 Geo. 3, c. 27, s. 8, 3 J. B. Moore, 623; 1 B. & B. 13, 294; 3 J. B. Moore, 244. The plea must show in what manner the defendant was discharged, unless the act under which he was discharged gives a general form; 8 East, 48; Willes, 199. To what debts the discharge extends; *Bishop* v. *Polhill and another*, 1 Mood. & Rob. 363. In an action against husband and wife for a debt contracted by the latter before coverture, it was held that her discharge while a feme sole, under 7 Geo. 4, c. 57, might be pleaded; *Storr* v. *Lee*, 1 P. & D. 633. A surety for the payment of an annuity by a party is not released from his liability by the grantor of the annuity becoming insolvent and discharged under the 7 Geo. 4, c. 57; *Hocken* v. *Brown*, 6 Dowl. 634. The discharge of an insolvent from a debt in respect of which he has accepted a bill of exchange, is no discharge as to the bill in the hands of a third person, unless the holder's name be inserted in the schedule, or it be stated therein that he is unknown, pursuant to stat. 1 & 2 Vict. c. 110, s. 75; *Beck* v. *Beverley*, 11 M. & W. 845. It must, it seems, be pleaded specially, if the discharge was after issue joined; 8 Price, 603. If the discharge was after action, but before issue joined, then it may, it seems, be pleaded generally in further bar of the action, upon the same principles that a plea of bankruptcy is so pleadable; see 8 Price, 607. Where a plaintiff had agreed to abandon his debt, and requested defendant not to insert it in his schedule, it was held that the defendant might give it in evidence under the general issue, and need not plead it specially; 3 J. B. Moore, 234; but see the form of special plea, *Stracey* v. *Blake*, 1 M. & W. 168; as to *replication*, 3 Taunt. 237.

(*b*) The plea should aver that the vesting order was made before the commencement of the suit; *Tucker* v. *Webster*, 1 Dowl. N. S. 960.

(*c*) In reciting this (or any other) statute in pleading, the whole of its title must be stated, though it comprise several other subject matters besides that to which the pleading relates; *Beck* v. *Beverley*, 11 M. & W. 845.

(*d*) This, like all other pleas in discharge, must confess and avoid, and therefore to insert here "*if any such were made*" would be bad; *Gould* v. *Lashbury*, 1 Crom. M. & Ros. 254; 2 Dowl. 77, S. C. *Margetts* v. *Bays*, 4 Ad. & El. 489; but the word "*supposed*" is a sufficient admission, *Eavestaff* v. *Russell*, 10 M. & W. 366.

(*e*) Sect. 10 of this statute enacts, "That if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence. See plea of plaintiff's discharge, *ante*, 75, where the proceedings are fully set forth.

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having resided twelve calendar months in London [*or*, "within the London district," *or, if within any other district*, "within the district of ——,"] under and by virtue of and according to the directions and provisions of a certain statute made and passed in the sixth year of the reign of our lady the now queen, intituled "An Act for the Relief of Insolvent Debtors," duly presented his petition for protection from process to the Court of Bankruptcy in London, [*or* "to the Court of Bankruptcy for the —— district, in the county of ——,"] which said petition was forthwith afterwards, to wit, on &c. filed of record in the said Court of Bankruptcy. And the defendant further says, that such proceedings were had in the said [district] Court of Bankruptcy upon the said petition of the defendant, that afterwards and before the commencement of this suit, to wit, on &c., a final order was made by J. H. M. Esq. one of the Commissioners of the said [district] Court of Bankruptcy, duly authorised in that behalf, for the protection of the person of the defendant from all process, and for the vesting of the estate and effects of the defendant in F. G. one of the official assignees of the said [district] Court of Bankruptcy, and one H. V. the assignee duly appointed by the creditors of the said defendant, whereby and by force and virtue of which said order the defendant was discharged of and from the several promises and causes of action in the declaration mentioned; and the defendant further saith, that the said order and discharge still remain in full force. And this the defendant is ready to verify, &c.

Plea of discharge under insolvent act pending action.

Lockwood v. *Salter*, 5 Bar. & Adol. 303.

Plea that a bill was made for a debt due before the defendant was discharged under insolvent act, 1 & 2 Vict. c. 110. (*f*)

And the defendant, by —— his attorney, as to the first count of the said declaration, says, that the bill of exchange in the said first count mentioned, and therein alleged to be made and drawn by the said A. B., and to be accepted by the defendant, was made and drawn by the said A. B. upon and accepted by the defendant for and in respect of a certain debt and sum of money due and owing from the defendant to the said A. B. before the time of his, the defendant's, discharge by the Court for the Relief of Insolvent Debtors in England, as hereinafter mentioned, whereof the plaintiff before and at the time when the said A. B. indorsed the said bill of exchange to the plaintiff had notice. And the defendant in fact further says, that he, the defendant, afterwards, and after the accepting of the said bill of exchange, and before the commencement of this suit, to wit, on &c., by a certain order made by the Court for the Relief of Insolvent Debtors in England, held at [the Court-House in Portugal Street, Lincoln's Inn Fields, in the county of Middlesex], was duly discharged according to a certain act of parliament made and passed in the second year of our lady the now queen, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent

(*f*) Where the consideration for the bill was the old debt due before insolvency, and a further and new debt, the defendant cannot plead his discharge under the insolvent laws as an answer to the whole bill, but only as to the part relating to the old debt; *Sherman* v. *Thompson*, 3 P. & D. 656; 11 A. & E. 1027, S. C.

Debtors in England," of and from the said debt in respect whereof the said bill of exchange was so accepted by him as aforesaid, and that the aforesaid discharge still remains in full force and effect. And this the defendant is ready to verify, &c.

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Plea of the sequestration in Scotland of the defendant's estate under the 2 & 3 Vict. c. 41.

And the defendant, by —— —— his attorney, says, that heretofore, to wit, on the —— day of ——, A. D. ——, and thence continually, until the sequestration of the estate heritable and moveable, real and personal, of the defendant, hereinafter mentioned, he the said defendant was a trader, to wit, a [*state his trade*], residing and carrying on his trade at Edinburgh, in that part of the united kingdom called Scotland, and during all that time sought his living by buying and selling; and that on the day and year aforesaid defendant became indebted to one J. D. in the sum of five hundred pounds for a just and true debt, and was also indebted to divers other persons in divers large sums of money; and being so indebted, and being insolvent, and unable to pay the said debt so due and owing to the said J. D., and the said other debts, did afterwards, to wit, on the —— day of ——, A. D. ——, at Edinburgh aforesaid, with the concurrence of the said J. D., to whom the said defendant was so indebted as aforesaid, apply by petition to the Lord Ordinary for the sequestration of the whole real and personal estate of him the defendant. And the defendant further says, that *upon the* petition of the said J. D., the Lord Ordinary thereupon issued a *deliverance*, by which sequestration of the estates, real and personal, be*longing* to the said defendant, was duly awarded. And defendant further says, that thereupon, in pursuance of the statute made and passed at a session of parliament holden in the second and third years of the reign of Queen Victoria, being "An Act for regulating the Sequestration of the Estates of Bankrupts in Scotland," the said Lord Ordinary did, on the —— day of ——, A.D. ——, appoint a meeting of the creditors of the said defendant, to be held at one of the clock, on the —— day of ——, A. D. ——, within the Old Signet Hall, Royal Exchange, Edinburgh, to elect an interim factor, being not earlier than eight and not later than fourteen days from the date of the said deliverance; and the said Lord Ordinary did also appoint the —— day of ——, at one of the clock, in the year aforesaid, to elect a trustee or trustees in succession, and commissioners, being not less than four and not more than six weeks from the date of the deliverance. And defendant further says, that in pursuance of such first-mentioned appointment, at a meeting of the creditors, held, to wit, on the said —— day of ——, in the year aforesaid, an interim factor was duly elected; and that in pursuance of such second-mentioned appointment, at another meeting of the creditors, held, to wit, on the —— day of —— A.D. ——, a trustee was duly elected. And defendant further says, at the said meeting for an election of trustee, he defendant proposed to his said creditors that they should accept and receive from defendant six shillings and eightpence in the pound, by way of composition, upon the whole amount of debts due and owing from him the said defendant to his respective creditors, with security for payment of the same; whereupon the whole of the said defendant's creditors then present at such meeting unanimously resolved, that such offer of composition of six shillings and eightpence in the pound, together with security for securing the due payment thereof, should be entertained for

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consideration. Whereupon E. F., writer in Glasgow, the trustee so elected as aforesaid, in pursuance of the said statute so made and passed at a session of parliament holden in the second and third years of the reign of Queen Victoria, for regulating the sequestration of the estates of bankrupts in Scotland, duly published a notice in the Edinburgh Gazette, that an offer of composition had been so made and entertained, and that a meeting would be held on a certain day therein mentioned, to decide on the acceptance of such composition: and the said trustee did give notice of such meeting to the said creditors, in pursuance of the said statute in that case made and provided. And defendant further says, that heretofore, to wit, on the —— day of ——, A. D. ——, to wit, at Edinburgh, in pursuance of such advertisement and notice, a meeting of the creditors of the said defendant was held in order to decide upon such offer of composition; whereupon the whole of the creditors then present unanimously agreed to accept such composition of six shillings and eightpence in the pound, and a bond of caution to be executed by the said defendant and his proposed cautioner. And defendant further says, that afterwards, to wit, on the —— and —— days of ——, in the year aforesaid, he the said defendant, and one G. H. as his cautioner, duly executed a bond, conditioned to secure the due payment of the said composition so agreed to be accepted, (which said bond was duly lodged in the hands of the said trustee); whereupon the said Lord Ordinary duly approved thereof, and found that the offer of composition and security had been duly made, and that the same was reasonable, and had been assented to by a majority in number and nine-tenths in value of the creditors assembled at such last-mentioned meeting, upon which a deliverance was pronounced approving thereof. And defendant further says, that in pursuance of the said statute, he the defendant did make and subscribe a declaration before the sheriff of the county of Edinburgh, in conformity to the said statute relating to the sequestration of the estates of bankrupts in Scotland; and that afterwards, to wit, on the —— day of ——, A. D. ——, the sheriff substitute of the county of Edinburgh found that the said defendant had complied with all the requisites of the said statute for regulating the sequestration of the estates of bankrupts in Scotland, and thereupon discharged the said defendant from all debts and obligations contracted by him, or for which he was liable on the date of the sequestration, and declared that the said sequestration was at an end, and the said defendant reinstated in his estate, subject to the said composition. Whereupon afterwards, to wit, on the day and year last mentioned, the said ordinary, in pursuance of the said statute regulating the sequestration of the estates of bankrupts in Scotland, confirmed the said deliverance. And defendant further says, that the said several debts and causes of action in the declaration mentioned, accrued to the plaintiff before the —— day of ——, A. D. ——, and were proveable under the said sequestration. And this the defendant is ready to verify, &c.

3. Composition.

Composition with creditors by deed. (g)

And for a further plea, the defendant saith, that after the making of the said several alleged promises in the said declaration mentioned, and before the commencement of this suit, to wit, on &c. [*date of deed or agreement of composition*], a certain indenture was made by and between certain persons, to wit, the defendant and plaintiff and divers other persons, then being and therein described as being respectively creditors of the defendant, (and which said indenture sealed with the respective seals of the plaintiff and the said other persons, the defendant now brings here into Court,) the plaintiff did covenant, promise and agree to and with the defendant, that he, the plaintiff, should and would accept, and he, the plaintiff, did thereby accept, the sum of —— shillings in the pound for and in respect of each pound of the plaintiff's debt, amounting to a large sum of money, to wit, the sum of £—— in full satisfaction and discharge of the said sum of £——, and of the said promises in the said declaration mentioned in respect of the same. And the plaintiff thereby covenanted and agreed with the defendant, that he, the plaintiff, would not sue, arrest, implead, trouble, attach, or seize the defendant, or his estate or effects for or on account of the said sum of £——, or any part thereof, or of the said promises in the said declaration mentioned. And the defendant further saith, that divers other creditors of the defendant did then also in and by the said deed agree to accept, and *did then* accept the sum of —— shillings in the pound on each of their respective debts currently with the plaintiff, for and in satisfaction of the several debts to such creditors respectively due and owing from the defendant, and did also in and by the said deed covenant with the defendant not to sue the defendant for such respective debts. And this the defendant is ready to verify, &c.

First plea, non-assumpsit, except as to £20 : 9*s*.

And for a further plea in this behalf, except as to the sum of £20 : 9*s*., parcel of the said monies in the said declaration mentioned, the defendant says, that he did not promise in manner and form as the plaintiff hath above thereof complained against him; and of this the defendant puts himself upon the country &c.

Second plea, that a composition of 5*s*. in the pound was agreed to by plaintiff and other creditors, and defendant's due payment to plaintiff of his composition. (h)

And as to the said sum of £20 : 9*s*., parcel &c. the defendant says, that after the making of the said alleged promises in the said declaration mentioned, as to the sum of £20 : 9*s*., parcel &c. and before the commencement of this suit, to wit, on &c. the defendant was in bad and embarrassed circumstances, and indebted to the plaintiff in the said sum of £20 : 9*s*., parcel &c. and to divers other persons respectively in divers large sums of money, and was unable to pay the plaintiff and the said other creditors of the defendant respectively their debts in full, whereof they then had notice. And thereupon the defendant then offered and agreed

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(g) See another form in *Cooper* v. *Phillips*, 3 Dowl. 196; 1 Crom. M. & Ros. 649; 5 Tyrw. 167; and see useful forms of pleas of agreements for compositions not under seal, and payment of the stipulated composition by way of accord and satisfaction, two forms Chitty's jun. Precedents, 286, 287, and notes; and see plea in *Woodham* v. *Edwardes*, 5 A. & E. 771; 1 N. & P. 207, S. C.; and authorities collected Chitty on Bills, 8th edit. 606; Smith's Mercantile Law, 3rd edit. 700; see also *ante*, 42. Suppression of facts renders composition deed void; *Vine* v. *Mitchell*, 1 Mood. & R. 337. As to when a covenant not to sue amounts to a release see *Walmsley* v. *Cooper*, 11 A. & E. 216; 3 P. & D. 149.

(h) This form is in part the same as in *Cooper* v. *Phillips*, 1 Crom. M. & Ros. 649; 3 Dowl. 196; but the conclusion in the

COMPOSITION. with the plaintiff and the said other creditors of the defendant to pay to them respectively, and the plaintiff and the said other creditors then mutually agreed with each other and with the defendant to accept of him, 5*s.* in the pound as a composition upon and in full satisfaction and discharge of their respective debts, such composition to be paid by the defendant to the plaintiff and the said other creditors of the defendant respectively on the —— day of —— then next following; and the plaintiff and the said other creditors of the defendant then mutually agreed with the defendant not to proceed against the defendant for the recovery of the residue of the said respective debts and demands, unless default should be made in payment of such composition as aforesaid. And the defendant further saith, that the composition or sum of 5*s.* in the pound on the said sum of £20 : 9*s.* parcel &c. amounts to a large sum, to wit, the sum of £5 : 2*s.* 3*d.*, whereof the plaintiff afterwards, to wit, on &c. last aforesaid, had notice. And that he, the defendant, before the commencement of this suit, to wit, on &c. last aforesaid, (*i*) duly paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, the said sum of £5 : 2*s.* 3*d.* as and for such composition upon the said sum or debt of £20 : 9*s.*, parcel &c. in pursuance of the said agreement. And this the defendant is ready to verify, &c.

Plea, that in consideration of defendant's assigning all his real and personal property and his pay as a post-captain in the navy to trustees for the benefit of his creditors, the plaintiff and other creditors agreed to postpone calling for immediate payment and to receive their debts proportionately. (*k*)

And for a further plea in this behalf, as to £125 : 8*s.* 5*d.*, parcel &c. the defendant says, that after the making of the promises in the declaration mentioned, as to the said sum of £125 : 8*s.* 5*d.*, parcel &c., and before the commencement of this suit, to wit, on &c., the defendant was in bad and embarrassed circumstances, and was indebted to the plaintiff in the said sum of £125 : 8*s.* 5*d.*, and to certain other persons respectively in divers other sums of money, and was unable then to pay the plaintiff and the said other creditors of the defendant the said debts in full, whereof they then had notice. And thereupon then, to wit, on the day and year last aforesaid, by a certain agreement in writing then made by and between the defendant of the one part, and the plaintiff and the said other creditors of the defendant of the other part, whose names were subscribed to the said agreement, it was agreed by and between the said parties respectively, (amongst other things,) that the defendant should, as soon as his said several creditors should have signed the said agreement, make over and convey to one C. and one D., two of the said creditors, all his property, both real and personal, in trust to sell, and, after payment of the charges and mortgages thereon and expenses, to divide the surplus equally amongst his said creditors parties to the said agreement, according to the amount of their said debts, and to assign to C. and D. certain pay which the defendant then received as a post-captain in the navy, and a certain pension which he then enjoyed, in such manner as counsel should advise and think right and proper, as a security for payment thereout

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above precedent has been framed so as to avoid the objection there taken, viz. that the plea ought to show actual *payment* or *tender* of the amount of the composition. And see form in *Reay* v. *Richardson*, 2 Crom. M. & Ros. 425.

(*i*) Unless the composition was paid precisely on the day, then the payment thereof should be pleaded by way of accord and satisfaction. And if not paid until after commencement of the action, the plea must state specially the payment into Court.

(*k*) See *Mathews* v. *Taylor*, 2 M. & G. 667. See form of composition alleging the execution of the deed by the manager of a banking company, *Bell* v. *Tuckett*, 3 M. & G. 785; and *post*, as to the replication.

of £200 per annum, by half-yearly payments, to the said trustees in trust, (if the majority of the said creditors in amount at any meeting to be called by them should think fit,) to insure the defendant's life for any sum not exceeding £700, and to pay the annual premiums thereon out of the said annual sum of £200, and to apportion the remainder thereof, or the whole, as the majority of such creditors in amount should determine, equally among the creditors, parties to the said agreement, until the whole of their debts should be liquidated; and the plaintiff and the said other creditors respectively thereby then, in consideration of the premises, agreed with the defendant and with each other, that on the defendant executing such conveyance and assignment in trust, in such form and with such clauses and powers as the said trustees such think proper for fully carrying into effect the said agreement, and so long as the said sum of £200 a-year should be regularly paid to the said trustees in trust as aforesaid by half-yearly payments, the plaintiff and the said other creditors would postpone calling for, or requiring immediate payment of, their said debts respectively, and would receive the same proportionably under the said trust deed; but the said agreement was to be void, unless the creditors of the defendant, whose names and descriptions were stated on the other side of the said agreement, should concur in the said arrangement (*l*), or in case the defendant should refuse or neglect to execute such trust deed and assignment for one week after notice from the trustees that it was ready for his execution. And the defendant further says, that after the making of the said agreement, and so soon as the same had been signed by the said other creditors, and within one week after notice in that behalf from the trustees, and before the commencement of the suit, to wit, on &c., by a certain indenture, &c. [*set out the deed conveying the defendant's property and pay to C. and D. with profert, or excuse of profert, of the deed,*] such conveyance and assignment respectively being duly made by the defendant to the said trustees in trust and for the several purposes in the said agreement mentioned and referred to, and in such form and with such clauses and powers as the said trustees thought right and proper in that behalf for fully carrying into effect the said agreement according to the true intent and meaning thereof. And the defendant further says, that the said indenture has ever since the making thereof remained and still is in full force and virtue, and that the said annual sum of £200, in the said agreement and indenture respectively mentioned, has been duly and regularly paid from time to time by the defendant to the said trustees in trust as aforesaid, by half-yearly payments, according to the true intent and meaning of the said agreement; of all which several premises and matters respectively the plaintiff continually and from time to time had due notice. And this the defendant is ready to verify, &c.

COMPOSITION.

And for a further plea in this behalf the defendant says, that after the accruing of the said debt of the said R. M. as in the declaration mentioned, and before the commencement of this suit, to wit, on &c., the said R. M.

To action on a guarantee, plea that the plaintiff accept-

(*l*) This is not such a condition precedent, the performance of which the defendant is bound to aver on setting up the agreement, but it is matter *ex post facto*, and any allegation in respect of it must come from the plaintiff; *Mathews* v. *Taylor*, 2 M. & G. 667, 673.

Composition. ed a composition from the principal debtor.(m)

was indebted to the plaintiff in a large sum of money, to wit, the sum of £1100, whereof the said sum of £—— [*the amount stated in the declaration to have been due from R. M.*] was parcel, and to divers other persons respectively in divers large sums of money, and was in bad and embarrassed circumstances, and unable to pay the plaintiff and the said other creditors of him the said R. M. respectively their said debts in full, whereof the plaintiff and the said other creditors then had notice; and thereupon the said R. M. then offered and agreed to and with the plaintiff and his the said R. M.'s other creditors to pay, and the plaintiff and the said other creditors of the said R. M. mutually agreed with each other and with the said R. M. to accept of and from him, a certain composition, to wit, at the rate of 10*s.* 6*d.* in the pound, as a composition for, upon, and in full discharge and satisfaction of the said respective debts in full. And the defendant further says, that the said composition or sum of 10*s.* 6*d.* in the pound, on the said sum of money so owing from the said R. M. to the plaintiff, amounts to the sum of £577 : 10*s.* parcel thereof, and that he the said R. M. before the commencement of this suit, to wit, on &c., paid to the plaintiff, and the plaintiff then accepted and received of and from the said R. M., the said sum of £577 : 10*s.* as and for such composition upon the said sum of £1100, in pursuance of the said agreement. And this the defendant is ready to verify, &c.

Tender, &c.

4. Tender, &c.

Non-assumpsit except as to sum tendered.(n)

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——. (o)

And the defendant, by E. F. his attorney, except as to the sum of £——, (p) parcel of the several sums of money in the declaration mentioned, [*or if some of the counts are denied altogether, or a tender cannot be pleaded thereto, say,* " in the said third, fourth, and last counts mentioned,"] saith, that he did not promise in manner and form as the plaintiff hath above thereof complained. And of this he puts himself upon the country, &c.

Tender of that sum.

And as to the said sum of £——, parcel &c. (q) the defendant says, that the plaintiff ought not to maintain his aforesaid action thereof against him

(m) See *Davidson* v. *M'Gregor*, 8 M. & W. 755.

(n) See forms, Pl. A. 225, 269, 448, 452; 3 Dowl. 13. A defendant cannot plead non-assumpsit to the *whole* and a tender as to *part*, but must qualify the general issue and his other plea as above, admitting the liability as to the sum tendered; 4 T. R. 194. See observation in 1 Camp. 184, in note. In assumpsit for not repairing, or any action for unliquidated damages, although money may be paid into Court since 3 & 4 W. 4, c. 42, sect. 2, yet a tender cannot be pleaded nor a set-off; *Seale* v. *Barrett*, 4 Nev. & Man. 200; 2 Adolph. & Ellis, 82. No other plea can be pleaded to the sum alleged to have been tendered; 3 Wils. 145; 2 Bla. Rep. 723. A tender always admits the cause of action as stated in the declaration; it only goes in bar of damages; per Burrough, J. in 7 Taunt. 487; and see 3 Taunt. 95; Tidd's Prac. 676. But *quære*, whether a plea of a tender of part of the sum claimed in the declaration, there being only one contract proved, admits the contract; *Jones* v. *Flint*, 2 P. & D. 594. As to what is a sufficient tender, see 3 Chit. Com. Law, 136; 1 Chit. Gen. Prac. 506; 3 C. & P. 453; 3 Bing. 304; 2 C. & P. 77, 50; *Jones* v. *Arthur*, 8 Dowl. 442; *Thorpe* v. *Burgess*, *id.* 603; *Richardson* v. *Jackson*, 8 M. & W. 298. As to costs on this plea, see Tidd's Prac. 9th edit. 971.

(o) This, as well as all other pleas in personal actions, is to be entitled of the day the plea is delivered. Reg. Gen. Hil. T. 4 W. 4. reg. 1.

(p) The sum tendered. Proof of the tender of a larger sum supports the allegation of the tender of a less sum; 3 Stark. Evid. 1559; *Dean* v. *James*, 4 Bar. & Adol. 548; 1 Nev. & Man. 393, S. C.

(q) The " &c." is sufficient after the exception is once fully stated.

Tender, &c.

to recover any more or greater damages than the said sum of £——, parcel, &c. (*q*) in this behalf, because he says, that after the making of the said promises as to the said sum of £——, parcel &c. (*q*), and before the commencement of this suit, to wit, on, &c. (*r*) he the defendant was ready and willing, and then tendered (*s*) and offered (*t*) to the plaintiff to pay him the said sum of £——, parcel &c. to receive which of the defendant he the plaintiff then wholly refused; and the defendant further saith, that he the defendant hath always, (*u*) from the time of the making of the said several promises in the said declaration mentioned, [*or*, "in the said —— counts mentioned,"] as to the said sum of £——, parcel &c. hitherto been ready to pay and still is ready to pay to the plaintiff the said sum of £——, parcel &c. [and he now brings the same into Court here ready to be paid to the plaintiff if he will accept the same,] [*or if the money has been already paid into Court, instead of the words between brackets, the form should be thus*, "and the defendant avers that he the defendant hath paid the said sum of £—— into the Court of our said lady the queen, in this action so depending as aforesaid, ready to be paid to the plaintiff, if he will accept the same."] And this he the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him to recover any more or greater damages than the said sum of £——, parcel &c. in this behalf &c. (*x*)

Plea of set-off to the sum not tendered. (*y*)

And for a further plea in this behalf, except as to the said sum of £——, parcel &c. the defendant saith, that the plaintiff, before and at the time of the commencment of this suit, was, and from thence hitherto hath been and still is indebted to the defendant in a large sum of money, to wit, the sum of £——, for &c. [*here state the subject-matter of the set-off, and then proceed as follows:*] which said sum of money so due from the plaintiff to the defendant exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant of the said promises in the said declaration mentioned, [*or*, "in the said —— counts mentioned,"] except as to the said sum of £——, parcel &c. and out of which said sum of money so due to the defendant, he the defendant is ready and willing and hereby offers to set off and allow to the plaintiff the full amount of the said damages, except as aforesaid, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

(*q*) See preceding note, p. 90.

(*r*) Any day about the time of the tender.

(*s*) If in fact the money was not produced and actually tendered, but the plaintiff dispenses with such actual tender, it seems such *dispensation* should be stated specially, *Finch* v. *Brook*, 5 Moore & Scott, 70, as thus:—"And the defendant was then about to and offered to produce and tender and pay the said sum to the plaintiff, but the plaintiff then dispensed with any actual payment or tender thereof, by then declaring to the defendant, that he did not require any such production or tender, and would not take the said sum of £——, or any thing less than the sum of £——, then demanded by him of the defendant."

(*t*) This is necessary, 2 Wils. 74; 10 East, 101.

(*u*) This is necessary, 1 Saund. 33, note 2; 1 Lord Raym. 254; 8 East, 168.

(*x*) As to the conclusion, see 2 Salk. 622; 1 Lord Raym. 254, S. C.; Willes, 13.

(*y*) See form, 2 Rich. C. P. 25, 26, 29. A plea of set-off is *here* given, because it is frequently pleaded with the plea of tender, in which case it varies in point of form in some trifling respects from the usual plea of set-off. A set-off must always now be *pleaded*, and cannot be taken advantage of by a *notice*. *Ante*, vol. i. 595, note (*m*).

ACCORD AND SATISFACTION.

5. ACCORD AND SATISFACTION.

Accord and satisfaction after breach by delivery of a pipe of wine or other chattel. (*x*)

The defendant, by Y. Z. his attorney, saith, that after the making of the said several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on &c. he the defendant delivered to the plaintiff [one pipe of wine,] of great value, to wit, of the value of £100, (*a*) in full satisfaction and discharge of the said several promises and of all the said sums of money in the said declaration mentioned, and of all the damages by the plaintiff sustained by reason and in consequence of the non-performance and non-payment thereof, and which said [pipe of wine] the plaintiff then accepted and received (*b*) of and from the defendant in full satisfaction and discharge of the said several promises, and of all the sums of money in the said declaration mentioned, (*c*) and of the said damages. And this the defendant is ready to verify, &c.

The like of a bond given in satisfaction. (*d*)

And for a further plea in this behalf, the defendant says, that after the making of the said several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on &c. [*date of bond*] he the defendant, at the request of plaintiff, made and sealed, and as his act and deed delivered to the plaintiff, his the defendant's certain writing obligatory, in the penal sum of [£1000,] conditioned for the payment of [£500,] and interest for the same, by the defendant to the plaintiff, at a certain time therein mentioned, and which said writing obligatory the defendant then delivered to the plaintiff, in full satisfaction and discharge of

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(*x*) See forms, Morg. 232; Pl. A. 245; Lil. Ent. 105, 120, 498; and see 1 Bing. N. C. 504; 1 Hodges, 39; *Nogelen* v. *Mitchell*, 7 M. & W. 612. As to accord and satisfaction in general, see Bac. Ab. tit. *Accord and Satisfaction*; Com. Dig. tit. *Accord*. Accord and satisfaction must be *pleaded specially*, see *ante*, vol. i. According to 1 B. & C. 286, and 2 D. & R. 661, S. C., accord and satisfaction could not be pleaded as a sham plea; but according to other cases in 3 D. & R. 231, 1 B. & Cres. 81, S. C., and 1 M. & P. 338, it may. To an action for breach of contract, whereby, in consideration of the plaintiff's testator permitting the defendant to hold the office of steward of a manor at the will of the testator, the defendant agreed to pay an annuity to the late steward out of the fees of the office, the defendant cannot set up as an answer to the action, that the testator afterwards appointed him by deed for life; *Mattock* v. *Kinglake*, 1 P. & D. 46. Where the plaintiff, the acceptor of a bill, sent his son to the defendant, who represented himself to be the holder, with directions to pay the amount, and bring back the bill, and the son paid the money, but the defendant then, and on a subsequent request, refused to give up the bill or return the money, in an action against him for money had and received, it was held that the acceptance by the plaintiff of a guarantee from a third person to bear him harmless in case the bill should be again presented, operated by way of accord and satisfaction, and ought to have been specially pleaded; *Alexander* v. *Strong*, 9 M. & W. 733; 2 Dowl. N. S. 256.

(*a*) See Dyer, 75 a; 5 Barn. & Adol. 932; 3 Nev. & Man. 187, S. C.

(*b*) This is a material allegation; 3 East, 256; 1 Stra. 573.

(*c*) If there be several counts in the declaration, and the plea, professing to answer the whole, states that the goods, &c. were delivered and accepted in satisfaction "of the cause of action," it would be bad; 2 Chit. Rep. 303. If a writ was sued out, and the accord and satisfaction took place after that time, the plea should aver that the plaintiff accepted the thing in satisfaction of the costs as well as the damages sustained by the non-performance of the promises; 5 B. & Ald. 886; 1 D. & R. 546, S. C.

(*d*) In assumpsit upon a parol agreement, the defendant cannot, under non-assumpsit, show that an agreement, which was once a perfect contract, has since merged in a contract by deed; but where in contemplation of a deed to be executed between the parties, a draft is prepared, is finally approved of, and is afterwards engrossed and executed, an agreement contained in such draft cannot form the subject of an action of assumpsit; and therefore, to a count on such an agreement, non-assumpsit is a sufficient plea; *Filmer* v. *Burnby*, 2 M. & G. 529; and see *Heath* v. *Durant*, 1 Dowl. & L. 571.

ACCORD AND SATISFACTION.

said promises and of the said sums of money, and all damages the plaintiff sustained by reason and in consequence of the said non-performance and non-payment thereof, and the plaintiff then accepted and received the same of and from the defendant, in full satisfaction and discharge of the said several promises in the said declaration mentioned, and of all damages and sums of money therein mentioned, and of all damages by the plaintiff incurred and sustained by reason or in consequence of the non-performance of the said promises. And this the defendant is ready to verify, &c.

Plea of a bill delivered to plaintiff in satisfaction. (*f*)

And for a further plea in this behalf, the defendant saith, that after the making of the promise and accruing of the cause of action in the declaration mentioned, and before the commencement of this suit, to wit, on &c. the defendant delivered to the plaintiff, who then accepted and received of the defendant, a certain bill of exchange [*describe it*] in full satisfaction and discharge of the promise and cause of action in the declaration mentioned. And this the defendant is ready to verify, &c.

Plea, that the promises were made jointly with T. M., and that the plaintiff, for and on account of the sum due and of the promises of the defendant and T. M., drew a bill on T. M. which he accepted, and plaintiff recived it for and on account of the said sum and of the said promises. (*g*)

And for a further plea in this behalf, as to the sum of £150, parcel of the monies in the declaration [*or* "count"] mentioned, the defendant says, that the said alleged promises in the declaration mentioned, as to the said sum of £150, parcel &c. were made by the defendant jointly with one T. M., to *wit, on* the day and year in the declaration mentioned. And the defendant *further* says, that after the making of the said promises by the defendant and the said T. M. as aforesaid, and before the commencement of this suit, to wit, on the —— day of ——, A. D. ——, the plaintiff, for and on account of the said sum of £150, parcel &c., and of the said promises of the said defendant and the said T. M. in respect thereof, made and drew his certain bill of exchange in writing, bearing date, to wit, on the day and year last aforesaid, and directed the same to the said T. M., and thereby required the said T. M., three months after the date thereof, to pay to the plaintiff's order the sum of £150, and the said T. M., for and on account of the said sum of £150, parcel &c., and the said promises of him the said T. M. and the defendant in respect thereof, then accepted the said bill so drawn by the plaintiff as aforesaid, and then delivered the same to the plaintiff, who then took and received the same of and from the said T. M. for and on account of the

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(*f*) An averment of the payment of the bill is unnecessary, (see *Said* v. *Rhodes*, 1 M. & W. 153; 4 Dowl. 743, S. C.) and would render the plea bad for duplicity, *Wright* v. *Watts*, 2 G. & D. 386; and the plaintiff cannot reply that the note was not paid when due, but must traverse the acceptance in accord and satisfaction, *Said* v. *Rhodes*, 1 M. & W. 153; 4 Dowl. 743, S. C.; and it is a question for the jury, whether the bills were given in lieu of and satisfaction for the note, or only to gain time for payment; *Goldsheds* v. *Cottrell*, 2 M. & W. 20. The acceptance in satisfaction must be an act of the will in the party receiving; and where a judge directed the jury, that if the bill, the acceptance of which in satisfaction was pleaded by the defendant, was such a one as by the course of dealing between the parties the plaintiffs were bound to take, that was a taking in full satisfaction, it was held to be a misdirection; *Hardman* v. *Bellhouse*, 9 M. & W. 596. A promissory note given to secure advances is not merged in a warrant of attorney given before the note became due, to secure the amount of that note and further advances; *Bell* v. *Banks*, 3 M. & G. 264.

(*g*) This plea raises a *primâ facie* defence, and not an absolute one as in the preceding plea; and it is not necessary to allege, as in the subsequent pleas, that the bill was assigned over. The plaintiff must reply that, for it is in his knowledge and not in the defendant's; *Mercer* v. *Cheese*, 4 M. & G. 804.

ACCORD AND SATISFACTION.

said sum of £150, parcel &c., and the said promises of the defendant and the said T. M. in respect thereof. And this the defendant is ready to verify, &c.

Delivery and acceptance of defendant's promissory note on account, and indorsement thereof to third party. (*h*)

And for a further plea in this behalf, as to the sum of £—— [*the sum for which the note was given,*] parcel of the said several sums in the said declaration mentioned, the defendant says, that after the making of the said promises in the said declaration mentioned, as to the said sum of £——, parcel &c. and before the commencement of this suit, to wit, on &c. [*date of note*] he the defendant, at the request of the plaintiff, and for and on account of the said sum of £——, (*i*) parcel &c. made and delivered to the plaintiff his the defendant's promissory note in writing, bearing date the day and year last aforesaid, and thereby promised to pay to the plaintiff, or his order, [two] months after the date thereof, the said sum of £——, and the plaintiff then accepted and received the said note for and on account of the said sum of £——, parcel &c. (*k*) and by reason thereof, he the defendant then became and was and still is liable to pay the said sum of £—— in the said promissory note mentioned, according to the tenor and effect of the said note. And the plaintiff afterwards, and before the commencement of this suit, to wit, on. &c. indorsed and delivered the said promissory note to a certain person to the defendant unknown, and that that person, and not the plaintiff, at the time of commencing this suit, was and still is the holder thereof, and entitled to sue the defendant thereupon. (*l*) And this the defendant is ready to verify, &c.

Plea, that defendant accepted a bill of exchange payable to a third person. (*m*)

And for a further plea in this behalf, as to the sum of £——, parcel &c. the defendant saith, that heretofore, to wit, on &c. [*date of the bill*] the plaintiff made his certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby required the defendant [two] months after the date thereof, to pay to [E. F. or] his order, the sum of £——, for value received, which said bill of exchange the defendant then accepted for and on account of the said sum of £——, parcel &c. and then delivered the same bill so accepted to the plaintiff, who then accepted the same for or on account of and in payment of the said sum of £——, parcel &c. And whereby the defendant

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(*h*) This plea is sustainable; 5 T. R. 513; 10 Mod. 37. See note to last precedent, and plea, *post*, 96, and the case referred to in the note there. A plea to an action of assumpsit, that the plaintiff drew and the defendant accepted a bill of exchange for £60, in satisfaction of the plaintiff's demand, is not supported by evidence that the defendant transmitted to the plaintiff a blank acceptance with £60 in figures written in the margin, which the plaintiff altered and filled up as a bill for £46 before he signed his name to it as drawer; *Baker* v. *Jubber*, 1 M. & G. 212.

(*i*) In general the payment of a smaller sum cannot be pleaded as a satisfaction for a larger. Therefore the plea should be pleaded only to the amount of the sum in the note or bill, as in the above form, or else it should be averred that the defendant was not indebted to the plaintiff in more than that sum, see 2 B. & Cress. 477.

(*k*) In *Emplin* v. *Dartnell*, 1 D. & L., it was held by the Court of Exchequer, that "in discharge" means "for and on account;" and that if a bill or note is given on account of the debt, and is indorsed over, it is a suspension of the debt; and the plaintiff cannot reply to this plea, that he did not accept and receive it "in *satisfaction* and discharge." *Id. ibid.*

(*l*) See this allegation in *Crisp* v. *Griffiths*, 3 Dowl. 753.

(*m*) See form and law, Wight. 33; Co. Lit. 212 b; 5 T. R. 513. See notes to the former precedents, and Chitty, jun. Prec. 279 to 283.

then became and was and still is liable to pay to the said [E. F.] or his order, the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange and of his the defendant's said acceptance thereof. And this the defendant is ready to verify, &c.

Plea, that the defendant indorsed to plaintiffs a bill of exchange in discharge of part of the debt.

And the defendants, as to the sum of £187 : 12*s.* 7*d.*, parcel of the said monies alleged to be due from the defendants to the plaintiffs in the said —— and last counts of the said declaration mentioned, say, that after the making of the said promises in that behalf, and before the commencement of this suit, to wit, on, &c. the defendants, at the request of the plaintiffs, indorsed and delivered to them a certain bill of exchange, bearing date the day and year aforesaid, drawn by the defendants upon and accepted in writing by one G. H., and whereby the defendants requested the said G. H. to pay to the defendant's order the sum of £187 : 12*s.* 7*d.*, one month after the date thereof, for and on account of the said sum of £187 : 12*s.* 7*d.*, parcel as aforesaid, and the plaintiffs then accepted and received the said bill and indorsement for and on account of the said sum of £187 : 12*s.* 7*d.*, parcel &c. as aforesaid. And thereupon and thereby the defendants became and were and still are liable to pay to the holder of the said bill the amount thereof, according to the tenor and effect of the same. And this the defendants are ready to verify, &c.

Plea, that defendant indorsed and delivered to the plaintiff a bill accepted by a third person, and that plaintiff received the same for and on account of £15, parcel &c. and that the bill was not presented for payment when due.

And for a further plea in this behalf, as to the second count of the said declaration, so far as the same relates to the sum of [£15], parcel of the said monies therein mentioned, and the causes of action in respect thereof, says, that after the said sum of [£15], parcel &c. became due, and before the commencement of this suit (to wit,) on the —— day of ——, A. D. ——, the defendant for and on account of the said sum of [£15], parcel &c. and the causes of action in respect thereof, indorsed and delivered to the plaintiff a certain bill of exchange in writing, bearing date, (to wit,) the day and year last aforesaid, drawn by the defendant upon, and accepted by, one J. C. [payable at Messrs. ——, London], and whereby the defendant requested the said J. C. to pay to the defendant's order, three months after the date thereof, the sum of [£15]; and the plaintiff then took and received the same of and from the defendant for and on account of the said sum of [£15], parcel, &c. and the causes of action aforesaid. And the defendant avers, that the said bill was not presented to the said J. C. [*or*, "at Messrs. ——, London,"] on the day when the same became due, according to the tenor and effect thereof, and of the said J. C.'s acceptance thereof, but therein wholly failed and made default. And this the defendant is ready to verify, &c.

Plea of set-off and account stated in satisfaction and discharge, in an action by an assignee of an insolvent surviving partner, to causes of

And for a further plea in this behalf as to the sum of £451 : 18*s.*, parcel of the monies in the [first and second counts of the] declaration mentioned, the defendant says, that after making the promises in the said declaration [*or*, "in those counts mentioned,"] as to the said sum of £451 : 18*s.*, parcel &c. and in the lifetime of the said A. B. and before the said W. X. subscribed his petition &c. as in the declaration mentioned, to wit, on &c. the said W. X. and A. B. were indebted to the defendant in a large sum of money, to wit, the sum of £490 : 15*s.* for money lent to the said W. X. and

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action accruing to the partnership. (*n*)

A. B. at their request, for money paid to their use, for money received by them to the use of the defendant, and for interest on monies forborne by him to them; and that afterwards, to wit, on &c. an account was then had and stated by and between the said W. X. and A. B. and the defendant, of and concerning the monies in this plea mentioned, in which said account the said W. X. and A. B. were so indebted to the defendant, and of and concerning the said sum of £451 : 18*s.*, parcel &c. And the defendant then set off and allowed to the said W. X. and A. B. the said sum of £451 : 18*s.* out of the monies so due to the defendant as in this plea mentioned, and then exonerated and discharged the said W. X. and A. B. from the payment of the said sum of £451 : 18*s.*, parcel &c.; and of the monies so due from the said W. X. and A. B. to the defendant as aforesaid in full satisfaction and discharge of the promises in the first and second counts of the declaration mentioned, as to the said sum of £451 : 18*s.*, parcel &c. and of all damages by the said W. X. and A. B. sustained by reason of the non-performance thereof; which same set-off and allowance the said W. X. and A. B. then accepted and received of and from the defendant in full satisfaction and discharge as aforesaid. And this the defendant is ready to verify, &c.

Plea, as to parcel of the moneys, that the defendant made the promises in the declaration mentioned jointly with other parties, who delivered certain bills of exchange to the plaintiff in payment, that those persons were still liable to pay the bills which the plaintiff had indorsed for value to other persons unknown. (*o*)

And for a further plea in this behalf as to the sum of [£250], parcel of the moneys in the declaration mentioned, the defendant says, that he made the said promises in the declaration mentioned, as to the said sum of [£250] parcel as aforesaid, jointly with one R. B. and one T. R.; and that after the making thereof, and before the commencement of this suit, to wit, on the —— day of ——, 184—, the said R. B. and T. R. for themselves and for the said defendant, delivered to the plaintiff divers bills of exchange for sums amounting in the whole to the sum of £250, to wit, one bill of exchange bearing date, to wit, the day and year last aforesaid, for the sum of [£50], payable at [one] month from the date thereof, drawn by the said R. B. upon and accepted by the said T. R. and by the said R. B. indorsed in blank; and also a certain other bill &c. [*specify the bills according to the facts*], which said several bills of exchange were so delivered by the said R. B. and T. R. to the plaintiff, and by him then taken and received for and on account of the said sum of [£250], parcel as aforesaid, and in payment thereof; and the said R. B. and T. R. respectively then became and were and still are liable to pay the said several sums of money in the said bills of exchange respectively specified, according to the tenor and effect thereof; and the defendant says, that the plaintiff afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, indorsed the said several bills of exchange respectively to divers persons to the defendant unknown, and that such persons respectively, and not the plaintiff, at the time of the commencement of this suit, were and still are the holders thereof respectively for value, and entitled to sue the said R. B. and T. R. respectively thereon. And this the defendant is ready to verify, &c.

(*n*) See *Learmouth* v. *Grandine*, 4 M. & W. 658. The plaintiff may reply to this plea that W. X. and A. B. were not indebted to the defendant in manner and form, &c. *Id. ibid.*

(*o*) See *Maillard* v. *The Duke of Argyll*, 1 D. & L. 536.

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Plea that the debt was owing from a co-partnership, of which the defendant was a partner, and that the defendant retired from the partnership, and another person became liable to the debt, and thereupon the plaintiff discharged the defendant from all liability. (*p*)

And for a further plea in this behalf the defendant says, that heretofore, to wit, prior to the month of May, 18—, he, the defendant carried on business as a partner in a certain copartnership under the firm and style of A. & Co., and that the debt in the declaration mentioned was due and owing from the said firm of A. & Co. to the plaintiff; and the defendant further says, that heretofore, to wit, on the 1st day of May, 18—, he retired from the said copartnership, and one N. A. then became a partner in the said firm, and the said business was continued to be carried on under the firm and style aforesaid, whereof the plaintiff then had notice; and thereupon afterwards, in consideration that the said N. A. would, with the assent and knowledge of the plaintiff, when he should become partner as aforesaid, as a member of the said firm, become liable to and responsible for the said debt so due and owing as aforesaid to the plaintiff, the plaintiff agreed with the said firm and with the defendant to discharge and did discharge the defendant from all liability in respect thereof; and the defendant further says, that the said N. A. did become as aforesaid liable to and responsible for the said debt so due and owing as aforesaid, whereby the defendant became and was discharged as aforesaid. And this the defendant is ready to verify, &c.

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Plea of payment and acceptance in satisfaction before action commenced, to the whole declaration. (*q*)

And for a further plea in this behalf the defendant says, that after the making of the said promises in the declaration mentioned, and before the

(*p*) See *Hart* v. *Alexander*, 2 M. & W. 484.

(*q*) By the rule of Trin. Term, 1 Vict. (1838), "Payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar," and without such a plea, the defendant cannot show payment, even for the purpose of inducing the jury not to give any interest by way of damages from the date of such payment; *Adams* v. *Palk*, 2 G. & D. 450.

Payment may be pleaded generally to all the counts of a declaration, *Beesley* v. *Dolley*, 6 Bing. N. C. 37; *Mitchell* v. *Townley*, 7 A. & E. 164; *Noel* v. *Davis*, 4 M. & W. 136, overruling *Mee* v. *Tomlinson*, 4 A. & E. 262.

To a count for work done and attendance given by A. then and still the wife of the plaintiff, for the defendants and at their request, a plea of payments made from time to time to the wife, and accepted by her in satisfaction of the cause of action and damages, must aver that the wife was authorised by the plaintiff to receive payment; *Offley* v. *Clay*, 2 M. & G. 172.

In debt for £163 : 16*s.* for fifty-two weeks rent on a parol demise for twelve months from 25th of February, 1839 (Monday), at £3 : 3*s.* per week, a plea as to so much of the rent as accrued due before and on the 27th of July, 1839 (Saturday), payment and acceptance in satisfaction was held bad on special demurrer, as no weekly rent could have become due on the latter day, and no apportionment of the rent for the fraction of a week was shown; *Dunn* v. *Di Nuovo*, 3 M. & G. 105.

Where the plaintiff declared in debt for £19 : 18*s.* 6*d.*, interest due on a promissory note, the defendant pleaded payment as to all except £7 : 9*s.*, and as to that sum payment into Court. The plaintiff's particulars of demand claimed £19 : 18*s.* 6*d.* At the trial the plaintiff proved that the whole sum which had accrued due on the note since it had arrived at maturity was £75; the defendant proved payment to the amount of £62. The jury deducting £7 : 9*s.* (which was paid into Court) from the residue, £13, gave a verdict for the plaintiff for £5 : 11*s.* The Court held that the verdict was right, and that notwithstanding the defendant's plea of payment, the plaintiff was not bound to new assign and show that it was for a sum beyond that already paid that he brought his action; *Kenningham* v. *Alison*, 2 Dowl. N. S. 658; see also *Dite* v. *Hawker*, 1 D. & L. 189.

The Court will not compel a defendant to deliver particulars of a plea of payment; *Phipps* v. *Sothern*, 8 Dowl. 208.

But "in any case in which the plaintiff (in order to avoid the expense of the plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating

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commencement of this suit, to wit, on &c. (*r*), he the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, a large sum of money, to wit, the sum of £—— (*s*), in full satisfaction and discharge of the said *promises* in the declaration mentioned, and also of all *damages* (*t*) sustained by the plaintiff by reason of the non-performance of such promises. And this the defendant is ready to verify, &c. (*u*)

Plea as to £10, parcel &c. payment of that sum, and acceptance thereof in full satisfaction (*v*).

And for a further plea as to the sum of £10, parcel of the sum of money in the declaration mentioned, the defendant says, that after the making of the said promises in the declaration mentioned, as to the said sum of £10, parcel &c. and before the commencement of this suit, to wit, on &c. the defendant paid to the plaintiff and the plaintiff then accepted and received of him a large sum of money, to wit, the sum of £20, in full satisfaction and discharge of the said sum of £10, parcel &c. and of all damages by the plaintiff sustained by reason of the non-performance by the defendant of his promises in respect of the same. And this the defendant is ready to verify, &c.

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the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums."—Reg. Gen. T. T. 1 Vict.

Where a plaintiff gives credit in his particulars of demand for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount independently of the sums credited in the particulars, he is entitled to a verdict; *Eastwick* v. *Harman*, 6 M. & W. 13. And where in debt on simple contract, the declaration gives credit for payment of part of the debt, and alleges as a breach the non-payment of the residue, the plaintiff must, under the plea of numquam indebitatus, prove a debt exceeding the amount for which credit is given; *Price* v. *Rees*, 1 D. & L. 361.

Where credit is given by the plaintiff in one part of his particulars for payment of a sum, but it is debited in another part, this is no admission of payment; as where credit is given for a bill of exchange in the first instance, but it is debited again as returned dishonoured, there the case is the same as if the bill had not been mentioned at all in the particulars, the two items destroying each other. In such a case the plaintiff cannot avail himself of the delivery or transfer of the note without an appropriate plea; *Green* v. *Smithers*, 1 G. & D. 395. Nor does the rule apply to set-off; *Rowland* v. *Blakesley*, 2 G. & D. 734. An agreement to set off mutual demands does not support a plea of payment; *Id. ibid*; and see note (*a*), 2 G. & D. 736.

(*r*) If the payment be alleged to have been made after the cause of action accrued, it is immaterial that the day actually specified is a day before the cause of action accrued; *Beesley* v. *Dolley*, 6 Bing. N. C. 37.

(*s*) The sum is not material if laid under a videlicet, but the amount must cover the total amount claimed in the declaration; *Down* v. *Hatcher*, 2 P. &. D. 292. The defendant, however, is only bound to prove payment of as much as will cover any demand established by the plaintiff; *Falcon* v. *Benn*, 1 G. & D. 646.

(*t*) See *Wheeler* v. *Senior*, 9 Dowl. 270.

(*u*) A plea of *payment*, even before breach, must conclude with a verification; *Mack* v. *Rust*, 4 Dowl. 206; *Goodchild* v. *Pledge*, 1 M. & W. 362; 5 Dowl. 89, S. C.

(*v*) If a defendant pleads payment to the whole action, but proves payment of a less sum than the plaintiff establishes a claim to, he is not entitled to have a verdict entered for him on that issue even for the amount which he has proved, but the issue must be found for the plaintiffs, unless where the defendant by all his pleas taken together covers the whole cause of action; for where a defence is made up of several pleas, as for example non-assumpsit, payment, statute of limitations, and set-off, although the defendant may not have a defence to the whole action under any one or more of these pleas taken separately, yet he may plead each plea to the whole action, and if they altogether form a defence, they may be taken distributively, and the verdict entered for the plaintiff for such part of each plea as the defendant has proved, and he will be entitled to judgment on the whole record; *Cousins* v. *Paddon*, 2 C. M. & R. 547; 4 Dowl. 488, S. C.; *Moore* v. *Butlin*, 7 A. & E. 597; 2 N. & P. 436, S. C.; *Tuck* v. *Tuck*, 5 M. & W. 109. It seems, however, that although a plaintiff may not be entitled to have a verdict entered for him for the part payment he proves, when he fails in his defence as to the rest, yet that he is entitled to the benefit of such payment in reduction of damages, the rule of Trin. T. 1 Vic. being framed to prevent payment being given in evidence in reduction of damages, where there is no plea of payment on the record; *Lord* v. *Ferrand*, 1 D. & L. 630.

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Plea of payments and acceptance by plaintiff on *several days* of different sums in satisfaction. (*x*)

And for a further plea in this behalf, the defendant says, that after the making of the promises in the declaration mentioned, and before the commencement of this suit, to wit, on divers days and times, he the defendant paid to the plaintiff, and the plaintiff then accepted and received of the defendant, divers sums of money, in the whole amounting to a large sum of money, to wit, the amount of the monies in the declaration mentioned, in full satisfaction and discharge of the said promises and causes of action in the declaration mentioned. And this the defendant is ready to verify, &c.

Plea, that defendant paid the debt to a *third person*, to whom the plaintiff had sold it, in satisfaction.

And as to the sum of £——, parcel &c. as aforesaid, the defendant says, that after the defendant became indebted to the plaintiff in the same sum as in the declaration is alleged, and before the commencement of this suit, to wit, on &c. he the plaintiff bargained and sold and assigned to one ——, and the said —— bought, took and accepted of the plaintiff, amongst other things, all his the plaintiff's right, title, claim and interest, in and to the defendant's said debt of £——, for and in consideration of the said —— then paying to the plaintiff a large sum, to wit, the sum of £——, which sum the said —— then paid the plaintiff accordingly. And the defendant avers, that afterwards, and before the commencement of this suit, to wit, on &c. he the defendant, at the request of the said ——, paid to him the said sum of £——, in full satisfaction and discharge thereof, and of all the damages sustained by reason of the non-payment thereof, and the said —— then accepted the same in full satisfaction and discharge thereof, and of all damages sustained by reason of the non-performance thereof. And this the defendant is ready to verify, &c.

To an action for money had and received, plea that the money was received for the purpose of being remitted to third persons for the use of the plaintiff, and was so remitted by the defendant. (*y*)

And for a further plea in this behalf, as to £419, parcel of the monies in the declaration mentioned, the defendant says that true it is the said sum of £419 was received by the defendant for the use of the plaintiff, to wit, on the —— day of ——, 18—, but the defendant says that the said last-mentioned sum of money was so then received by the defendant for the use of the plaintiff for the sole and specific purpose of the same being remitted by the defendant for and on account of the plaintiff, who then was in certain parts beyond the seas, to wit, at Calcutta, in the East Indies, to certain persons then carrying on business as merchants and East India agents at Calcutta aforesaid, under the name, style and firm of Messrs. C. and Co., for certain reasonable commission and reward to the defendant in that behalf, and to be deducted from the said last-mentioned sum of money. And the defendant further says that within a reasonable time after the receipt of the said last-mentioned sum of money by the defendant, to wit, on the —— day of ——, 18—, the said last-mentioned sum of money, the said reasonable commission and reward of the defendant in that behalf, to

(*x*) See another form of plea, *Webb* v. *Weatherby*, 1 Bing. N. C. 502. The replication may traverse as well the payment as also the acceptance in satisfaction; *Webb* v. *Weatherby*, 1 Bing. N. C. 502; 1 Hodges' R. 39. S. C. See form of plea and replication in *Webb* v. *Weatherby*, 1 Bing. N. C. 502; 1 Hodges, 39, S. C. A plea of payment *after breach* must aver that *the* payment was made by defendant *and accepted by plaintiff in satisfaction*, or it will be demurrable; *Ansell* v. *Smith*, 3 Dowl. 193; *Cooper* v. *Phillips*, 3 Dowl. 196.

(*y*) See *M'Carthy* v. *Colvin*, 1 P. & D. 429.

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wit, £——, having been first deducted therefrom, was duly remitted by the defendant, for and on account of the plaintiff, to the said persons so carrying on business as aforesaid at Calcutta, under the name, style and firm of Messrs. C. and Co., according to the purposes for which the defendant received the same. And this the defendant is ready to verify, &c.

Payment *after action brought* of a sum accepted in satisfaction of debt and costs. (s)

And for a further plea in this behalf the defendant saith, that the plaintiff ought not further to maintain his aforesaid action thereof against him, because he saith, that after the making of the said promises in the said declaration mentioned, and after the issuing of the writ in this cause against the defendant, to wit, on &c. [*day of payment, or about it,*] he the defendant paid to the plaintiff a large sum of money, to wit, the sum of £—— [*the sum paid*], in full satisfaction and discharge of the said several promises in the said declaration mentioned, and also of all damages sustained by the plaintiff by reason of the non-performance of such promises, and also of all the costs then incurred and sustained by the plaintiff in this suit, (*a*) and which said sum of £——, he the plaintiff then accepted and received of and from the defendant in full satisfaction of the said promises, damages and costs. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action against him, &c.

To action by three plaintiffs for a joint demand, plea of accord and satisfaction with one of them, after commencement of suit, by a part payment in cash, and a set-off of a debt due from that one to the defendant. (*b*)

And for a further plea in this behalf as to the sum of £88, parcel of the monies in the declaration mentioned, the defendant says, that the plaintiffs ought not further to maintain their aforesaid action thereof against him, because he says, that before and at the time of the satisfaction and discharge hereinafter mentioned, the plaintiff A. W. was indebted to the defendant in the sum of £75, and that before and at the time of the satisfaction and discharge hereinafter mentioned the defendant was indebted to the plaintiffs in the sum of £88, parcel as aforesaid, and to the said plaintiff A. W. in the sum of £44, for the recovery of which said sum of £44, amongst other things, the said plaintiff A. W., before the said discharge and satisfaction, to wit, on the —— day of ——, 18—, commenced an action of debt in the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, which said action, before and at the time of the said discharge and satisfaction, was still pending. And the defendant further says, that he the defendant, so being indebted in the said sums of £88 and £44, amounting together to the sum of £132, and the said plaintiff A. W. being so indebted in the said sum of £75, he the defendant, after the commencement of this suit, to wit, on the —— day of ——, 18—, set off and allowed to the plaintiff A. W. the said sum of £75, so due to the defendant against the sum of £75, parcel of the

(s) If the debt, with or without costs, be paid after action brought, and be accepted in satisfaction of the debt and costs, it seems there would be a good defence; but such payment must be pleaded specially; see 5 B. & Ald. 886; Holt, C. N. P. 6; *Corbett* v. *Swinburn*, 8 A. & E. 673; 3 N. & P. 551, S. C. If the plea be pleaded only to the debt or a part of it, and not to the damages and costs appertaining thereto, it is nevertheless a good answer to so much as it is pleaded to; but the plaintiff may sign judgment for any damage not answered by that or another plea; *Henry* v. *Earl*, 8 M. & W. 228.

(*a*) This averment as to costs is not necessary; *Corbett* v. *Swinburne*, 8 A. & E. 673; 3 N. & P. 551, S. C.

(*b*) This is a good plea without alleging any authority from the two other plaintiffs to make the settlement; *Wallace* v. *Kelsall*, 7 M. & W. 264; 8 Dowl. 841, S. C.

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said sum of £132, and then paid to the said A. W. the sum of £57, and then delivered to the said A. W. a piece of flannel of great value, to wit, of the value of £2 : 6*d.*, in full satisfaction and discharge of the said sums of £88 and £44, and of all damages by the plaintiffs, and by the said plaintiff A. W. sustained either jointly or solely by reason of the non-payment of the said sums of £88 and £44 respectively, and of the costs and charges of the plaintiffs by them in and about their suit in this action, so far as the same relate to the said sum of £88, parcel as aforesaid, in that behalf expended, and of the costs and charges of the said plaintiff, A. W. by him about his suit in the said other action, so far as the same relates to the said sum of £44 in that behalf expended, and in full satisfaction and discharge of the said sum of £75 so due to the defendant, and of all damages by the defendant sustained by reason of the non-payment thereof; which said set-off and allowance, payment and delivery of the said piece of flannel, the said plaintiff A. W. then agreed to, accepted and received in full satisfaction and discharge of all the said debts, sums of money, damages and costs, in satisfaction and discharge whereof they were so made by the defendant as aforesaid. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiffs ought further to maintain their aforesaid action against him in respect of the said sum of £88, parcel as aforesaid.

To an action on a policy of assurance effected by D. and Co., as agents of the plaintiff, plea that after the loss D. & Co. with the authority of the plaintiff, settled the amount, that D. and Co. were at the time indebted to the defendant in a larger sum than the amount so settled, and that by the authority of the plaintiff D. and Co. accepted a credit in account with the defendant as a satisfaction and payment, and made themselves liable to the plaintiff for the same, who discharged the defendant therefrom. (c)

And the defendant, as to the sum of £97 : 11*s.* 8*d.*, parcel of the sum of £100, in the first count of the declaration mentioned, says, that after the cause of action in the said first count mentioned, with respect to that sum, had accrued, and before the commencement of this suit, to wit, on the —— day of ——, 18—, the said persons using the name, style, or firm of D. & Co., the said agents for the plaintiffs in the said count mentioned, by and with the authority and assent of the plaintiffs, settled and adjusted with the defendant the amount of the loss on the policy of insurance in the said first count mentioned, and thereupon the amount of such loss was then settled and adjusted, according to the usage and custom of merchants in that behalf, at a certain sum, to wit, the sum of £97 : 11*s.* 8*d.*, in respect of the said sum of £100 so underwritten by the defendant on the said policy in the said first count mentioned, of which the plaintiffs then had notice, and then assented to and acquiesced in the said adjustment. And the defendant further says, that the said Messrs. D. & Co. before and at the time of the payment and satisfaction of the said loss so adjusted by the defendant as hereinafter mentioned, were indebted to the defendant in divers large sums of money, exceeding in the whole the said sum of £97 : 11*s.* 8*d.*, parcel &c. And

(c) Where an insurance broker, or other mercantile agent, has been employed to receive money for another in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with monies actually received, the rule laid down that where a principal employs an agent to receive money and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor by a set-off in account with him, cannot properly be applied, but it must be understood, that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention and with the authority of the principal; *Stewart* v. *Aberdein*, 4 M. & W. 228.

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thereupon, and before the commencement of this suit, to wit, on the day and year last aforesaid, the defendant, by and with the privity, knowledge and consent of the plaintiffs, paid and satisfied the said sum of £97 : 11*s.* 8*d.*, parcel &c. by giving credit to the said Messrs. D. & Co. for the said sum of £97 : 11*s.* 8*d.* in their said account with the defendant, and the defendant then wholly discharged the last-mentioned persons from all claims in respect of such last-mentioned sum of money, in this said account with them, and which said payment and satisfaction the said last-mentioned persons had full authority from the plaintiffs to accept and receive from the defendant on their behalf, as and for payment and satisfaction by the defendant of the said sum of £97 : 11*s.* 8*d.*, parcel &c., and the plaintiffs then accepted such settlement and payment by the defendant as aforesaid in full satisfaction and discharge of the said cause of action as to the said sum of £97 : 11*s.* 8*d.*, parcel &c. And as to the residue of the said sum of £100, in the first count mentioned, the defendant says that no loss was sustained in respect of the subject-matter of insurance in the said policy in the said first count mentioned, beyond the said sum of £97 : 11*s.* 8*d.*, parcel &c., so paid and satisfied as aforesaid. And this the defendant is ready to verify, &c.

Similar plea to same action, setting forth a custom between the insurance broker and the underwriters in London to make their settlements in account by way of payment and discharge according to a certain usage, and the plaintiff's knowledge of and assent thereto, and settlement accordingly.

And for a further plea in this behalf as to the said sum of £97 : 11*s.* 8*d.* parcel &c. the defendant says, that long before the said policy of insurance in the first count mentioned was effected, and from thence until and at the time of the adjustment and payment hereinafter mentioned of the said loss in the first count mentioned, the said Messrs. D. & Co., the said agents of the plaintiffs in the first count mentioned, exercised and carried on the trade and business of insurance brokers in the city of London, and the defendant exercised and carried on the trade and business of an underwriter in the said city of London ; and during all the time aforesaid accounts had existed, and at the time of the loss and of the adjustment and payment of the loss on the said policy did exist, between the said Messrs. D. & Co. as such insurance brokers as aforesaid and the said defendant as such underwriter as aforesaid, and in which accounts the said Messrs. D. & Co. had credit for losses, returns of premiums, and claims on policies underwritten by the defendant, and the defendant had credit for premiums of insurance on policies of insurance underwitten by him, and effected by the said Messrs. D. & Co., as such insurance brokers as aforesaid, and at the time when the loss on the said policy became known as hereinafter mentioned the said Messrs. D. & Co. were indebted on the said account to the defendant in divers large sums of money, exceeding in the whole the said sum of £97 : 11*s.* 8*d.*, parcel &c. ; and the defendant further says, that according to the usage and custom used and approved of amongst merchants, insurance brokers and underwriters in the city of London, when any loss or claim on a policy of insurance is adjusted and settled between an insurance broker and underwriter of such policy, and between whom such accounts as aforesaid exist, unless the assured shall otherwise direct, the premiums for which the underwriter has credit in such account at the time when such loss is made known are set off against the amount of such loss or claim on the policy, and the insurance broker is allowed in such account to the amount of such loss or claim ; and if at the time of the loss being made known as

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aforesaid the amount of premiums for which the underwriter had credit exceeds the amount of such loss or claim, then such set-off is deemed and considered as payment and satisfaction by the underwriter of such loss or claim, and the insurance broker holds himself accountable to the assured for the payment to him of such loss or claim; of which said usage and custom the plaintiffs, before and at the time of effecting the said policy and of the adjustment and payment hereinafter mentioned of the said loss on the said policy, had notice, and assented thereto; and the defendant further says, that the said loss on the said policy became first known to the defendant, to wit, on the —— day of ——, 18—, and that after the said cause of action with respect to the said sum of £97: 11*s.* 8*d.* parcel &c. had accrued, and before the commencement of this suit, to wit, on the —— day of ——, 18—, the said Messrs. D. & Co., as the agents of the plaintiffs, and with their knowledge and assent, adjusted and settled with the defendant the amount of the said loss on the said policy of insurance, and the amount of such loss was then settled and adjusted, according to the usage and custom of merchants in that behalf, at a certain sum, to wit, the said sum of £97: 11*s.* 8*d.* in respect of the said sum of 100*l.* so underwritten by the defendant on the said policy, of which the plaintiffs then had notice, and fully assented and acquiesced in the said adjustment. And the defendant further says, that he the defendant, according to the said usage and custom hereinbefore mentioned, afterwards, to wit, on the day and year last aforesaid, gave credit to the said Messrs. D. & Co. in their account with him for the said sum of £97: 11*s.* 8*d.* by setting off premiums to that amount for which the defendant had credit in such account at the time the said loss became known as aforesaid against such loss as aforesaid; and the said Messrs. D. & Co. then had credit to the extent of the said loss so adjusted as aforesaid in their said account with the defendant, and then held themselves accountable to the plaintiffs for the payment to them of the said sum of £97: 11*s.* 8*d.*, of all which premises the plaintiff afterwards, to wit, on the day and year last aforesaid, had notice, and fully assented and acquiesced therein, and then gave up and relinquished all claim against the defendant in respect of the said sum of £97: 11*s.* 8*d.* parcel &c., and accepted the said Messrs. D. & Co. as their debtors as to the said sum of £97: 11*s.* 8*d.* parcel &c. in lieu of the defendant, and the said defendant was thereby induced to give fresh credit to the said Messrs. D. & Co. for other premiums in his said account with them; by reason of which said several premises, the said cause of action and all claim by the plaintiffs against the defendant as to the said sum of £97: 11*s.* 8*d.* parcel &c. became and was wholly extinguished and discharged and satisfied, and as to the residue of the said sum of £100 in the first count mentioned, the defendant says, that the loss in the said first count mentioned did not exceed the rate of £97: 11*s.* 8*d.* on the said sum of £100 so insured by the plaintiffs as in the said first count mentioned. And this the defendant is ready to verify, &c.

PAYMENT INTO COURT.

7. PAYMENT INTO COURT.

In the ——.

Prescribed form of a *single* plea of payment of money into Court, pursuant to Reg. Gen. T. T. 1 Vict.(*d*)

C. D. ats. A. B. } The —— day of ——, A.D. 18—.

The defendant, by —— his attorney, [*or* "in person" &c.] says, [*or, in case it be pleaded as to part only, add,* "as to £——, being part of the sum in the declaration," *or* "count mentioned," *or* "as to the residue of the sum of £——"], that the plaintiff ought not *further* to maintain his action, because the defendant now brings into Court the sum of £——, ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained *damages*, [*or, in actions of debt,* "that he never was indebted to the plaintiff,"] to a greater amount than the said sum of £——, in respect of the cause of action in the declaration mentioned, [*or* "in the introductory part of the plea mentioned"]. And this he is ready to verify (*e*); wherefore he prays judgment if the plaintiff ought *further* to maintain his action thereof.

(*d*) See the rule of Court prescribing this form, *ante*, vol. i. 756. A plea of payment of money into Court to a count under this rule in bar of the *further* maintenance of the action cannot be pleaded to the same cause of action to which other pleas are pleaded in denial of the existence of that cause of action at the time of action brought; *Thompson* v. *Jackson*, 1 M. & G. 242.

A plea of payment of money into Court to a count in indebitatus assumpsit admits the existence of some contract or contracts falling within the description of the debt stated as the consideration of the promise laid in such count; but it does not amount to an admission of any particular contract, even of the contract in respect of which the money is in fact paid in; *Archer* v. *English*, 1 M. & G. 873; *Kingham* v. *Robins*, 5 M. & W. 94; see also *Stevenson* v. *The Mayor, &c. of Berwick*, 1 Q. B. Rep. 154; 4 P. & D. 546, S. C.; *Jourdain* v. *Johnson*, 2 C. M. & R. 569. But when pleaded to a special count, it operates as a confession of the debt as alleged in the declaration, *Kingham* v. *Robins*, 5 M. & W. 99; for this reason, that the payment admits that something is due, and therefore must admit that the contract was made by which alone anything is due from the defendant to the plaintiff. But that does not apply to the case of an indebitatus count, because that is not confined to one contract, but may extend to an indefinite number of contracts between the parties; *per* Alderson, B., *Stapleton* v. *Nowell*, 6 M. & W. 11. Where, however, in a count on a special contract, the plaintiff declared that he was engaged as a newspaper editor, "at a certain salary, to wit, 400*l.*" and claimed a quarter's salary as damages for dismissal without notice, and the defendant paid a sum into Court with the denial of damages ultra, it was held that he had not by this plea admitted a contract for the specific salary of 400*l.*; *Cooper* v. *Blick*, 2 G. & D. 295. But it seems that in an action for use and occupation, the defendant by payment into Court admits the contract, and it is not open to him to contend that the plaintiff is without title or that another co-plaintiff should have joined in the action, although these facts may appear doubtful on the plaintiff's own evidence; *Dolby* v. *Iles*, 3 P. & D. 287. And where the defendant pleads only payment of money into Court, he cannot prove, in mitigation of damages, facts which would be a bar to the action; *Speck* v. *Philips*, 5 M. & W. 279.

A plea of payment into Court by two defendants, pleaded to one or more indebitatus counts, admits only that the plaintiff has a cause of action on one or more of the contracts declared on to the amount of the sum paid in, and does not admit the defendant's *joint* liability to any greater amount, although the plaintiff gives evidence aliunde to fix one of the defendants with liability to a greater amount; *Stapleton* v. *Nowell*, 6 M. & W. 9.

Where a sum of money has been offered to a plaintiff in satisfaction of his demand, which he declines to accept, but subsequently, on its being paid into Court with a plea of such payment, he takes it out, the Court will not interfere to give the defendant his costs, unless the case has previously been before the Master; *Roe* v. *Cobham*, 6 Dowl. 628.

The form of this plea does not preclude a defendant from applying to enter a suggestion to deprive the plaintiff of costs; *Jorden* v. *Berwick*, 9 M. & W. 3; *Bernard* v. *Turner*, 1 M. & W. 580.

(*e*) It has been suggested that as no witness would be required to prove the fact that the defendant brought the money into Court, or to make out the negative proposition, that he was not further indebted, the verification is unnecessary; *Price* v. *Duggan*, 2 M. & G. 642, note (*a*); *Atwood* v. *Taylor*, 1 M. & G. 288, note (*a*). But it is to be observed that the rule of Court gives the above form.

PAYMENT INTO COURT.

D. ats. B. } The defendant, by Y. Z., his attorney, [*or*, " in person,"] except as to the said causes of action as to the sum of £——, parcel of the monies in the declaration mentioned, says, that he did not promise as in the declaration alleged; and of this he puts himself upon the country, &c. And as to the said causes of action in the declaration mentioned, so far as they relate to the said sum of £——, parcel &c. the defendant says, that the plaintiff ought not *further* to maintain his aforesaid action in respect thereof, because the defendant now brings into Court the sum of £——, ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages to a greater amount than the said sum of £——, in respect of the cause of action in the introductory part of this plea mentioned. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action thereof.

Non-assumpsit except as to a part; and secondly, plea of *payment of that part into Court.* (*f*)

8. ARBITRAMENT.

ARBITRAMENT.

And for a further plea in this behalf, the defendant saith, that after the making of the said several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on (*h*) &c. [*date of submission,*] the plaintiff and the defendant mutually and respectively submitted themselves [*here state the mode of submission, which may have been thus:*]—(that is to say) by two mutual bonds of arbitration, bearing date respectively,

Plea of a reference by bond to arbitrator and award thereon. (*g*)

(*f*) As to these pleas, see *Sharman* v. *Stevens*, 2 Crom. M. & Ros. 75; 1 Gale, 74; 3 Dowl. 709; *Coates* v. *Stevens*, 1 Gale, 75; 3 Dowl. 784. Per Patteson, J. *Booth* v. *Howard*, 5 Dowl. 441. Payment of money *into Court* should be pleaded as the *last* of several pleas; *Coates* v. *Stevens*, *supra*.

(*g*) As to this plea in general, see Com. Dig. Accord. D.; Bac. Ab. Arbitrament, G. Arbitrament and award might have been given in evidence under the general issue non-assumpsit; but it was frequently advisable to plead it, in order to compel the plaintiff in his replication to take issue on some particular part of the plea, and thereby admit the residue, or to reply specially. See the forms, 3 Wentw. Index, 8; Morg. Prec. 235, 237, 508; Lutw. 52; Clift. Ent. 495; Kyd on Awards, 2d edit. 465; Watson on Awards, 148; and since Reg. Gen. Hil. T. 4 Will. 4, arbitrament must be pleaded specially. Where, during the progress of a cause, an award had been made, in pursuance of a reference of the cause, but notwithstanding the plaintiff carried the cause down to trial, Lord Kenyon is reported to have doubted whether he should receive the award in evidence, or whether the defendant should not have pleaded it in a plea *puis darrein continuance*; 2 Esp. N. P. C. 504; and see 2 J. B. Moore, 30; 8 Taunt. 146, S. C. In an action of assumpsit for *unliquidated damages*, or in *trespass* for damages, a plea of a reference and award is valid, *without averring performance* of the award, the remedy being changed. But in an action of indebitatus assumpsit for *tolls* or other *debt*, a plea of reference and umpirage to pay £13, was upon demurrer held bad, for want of averring performance by payment of the sum awarded, *Allen* v. *Miller*, 2 Tyr. 113; 2 Crom. & Jer. 47, after citing *Crofts* v. *Harris*, Carth. 187, and 1 Lord Raym. 122; and *Gascoyne* v. *Edwards*, 1 Younge & Jerv. 19; *Truman* v. *Bernard*, 1 Salk. 19; *Adderley* v. *Evans*, 1 Ld. Raym. 250; and per Lord Lyndhurst, " The question is, whether the award is of itself a bar without averring satisfaction. The plaintiff's demand is for a *debt*, the money, therefore, till paid, is due in respect of the original debt. It might have been otherwise if the action had been for *not delivering goods*, and the award had been of money in lieu, or vice versâ. In such case it might have been contended, *that the remedy was changed*, but here the £13 is directed to be paid, which must be taken to be the *sum originally due*. In *Croft* v. *Harris*, the award being bad, the point did not properly arise, and what was said by Carthew was extra-judicial. In *Allen* v. *Harris*, Ld. Raym. 122, it was not the point for decision. As to *Gascoyne* v. *Edwards*, 1 Younge & J. 19, the demand there was for *general damages*, not for a debt; it is enough, therefore, to say that that case does not govern the present." See plea of reference and award in replevin, *post*.

(*h*) This is necessary, see Cro. Eliz. 66.

ARBITRAMENT. to wit, the day and year last aforesaid, to the arbitration of, and engaged in all things well and truly to stand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, final end and determination of, E. F. and G. H. arbitrators, indifferently elected and named, as well by and on the part and behalf of the plaintiff, as by and on the behalf of the defendant, to arbitrate, award, order, judge and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties, or either of them, so as the said award should be made by the said arbitrators under their hands, and ready to be delivered to the parties in difference, or such of them as should desire the same, on or before the —— day of —— then next; and it was then agreed by and between the plaintiff and the defendant, that such award to be made before that time between them should be binding and conclusive between them. Which time for making the said award was afterwards, to wit, on &c. [*day of enlargement,*] by consent of the plaintiff and the defendant, duly enlarged until &c. then next, and it was then agreed between the plaintiff and the defendant that the said award before that time made between them should be binding and conclusive between them. And the defendant further saith, that the said arbitrators, before the expiration of the said time limited for making their award, to wit, on &c. [*date of award*] took upon themselves the burthen of the said arbitration, and having duly examined and considered the subject-matters in dispute between the plaintiff and the defendant, they the said arbitrators did make their award in writing under their hands of and concerning the premises, and of and concerning the said promises in the said declaration mentioned, and ready to be delivered to the said parties in difference, and did thereby then award that &c. [*here set forth the award,*] as by the said award bearing date, &c. reference being thereunto had, will more fully appear. (*j*) [*And, when necessary, aver performance of the award, or a tender of such performance.*] And this the defendant is ready to verify, &c.

Time enlarged. (*i*)

The award made.

The award.

Plea of a reference *by agreement*, and stating the award. (*k*)

And for a further plea in this behalf, the defendant saith, that after the making of the promises in the said declaration mentioned, and before the commencement of this suit, to wit, on &c. certain differences having arisen and being depending respecting the same between the plaintiff and the defendant, they mutually submitted themselves to refer and did then refer the said matter in difference to the award, order and arbitrament of W. H. and T. F., and in case they should not agree, then to the umpirage

(*i*) The averment of enlargement must agree with the fact, and if there was no enlargement, should of course be omitted.

(*j*) As to the averment of performance, see *ante*, 105, n.; 3 Tyr. 113; 2 Crom. & J. 47.

(*k*) See plea to declaration by indorsee against the maker of a promissory note, that the note was indorsed and delivered to the plaintiff by his indorser, in violation of good faith, and in fraud and contempt of an order for referring the claim of that indorser to arbitration, and that the plaintiff took the note with full knowledge of the premises, *Smith* v. *Martin*, 9 M. & W. 304.

ARBITRAMENT.

of T. P., and agreed that the decision of the said arbitrators or umpire should be final, so as the said award or umpirage should be made in writing ready to be delivered to the said parties, or such of them as should desire the same, on or before the —— day of —— then next. And the defendant further saith, that afterwards, to wit, on the day and year last aforesaid, in consideration that the defendant had then promised the plaintiff to perform and fulfil the said award or umpirage in all things to be contained therein on the part of the defendant to be performed and fulfilled, he the plaintiff then promised the defendant to perform and fulfil the said award or umpirage in all things to be contained therein on his the plaintiff's part to be performed and fulfilled. And the defendant further saith, that the said W. H. and T. F. not having agreed upon the matters so referred to them, the said T. P. thereupon in due time, to wit, on the —— day of —— in the year aforesaid, took upon himself the burthen of the said arbitration and umpirage, and having duly examined and considered the said subject-matters in difference between the plaintiff and defendant; he the said T. P. did then make and publish his award and umpirage in writing under his hand of and concerning the premises ready to be delivered to the said parties, and did thereby then award and declare of and concerning the said matters in difference so referred, that the defendant should pay the plaintiff the sum of £——, on the —— day of —— then next, in full satisfaction and discharge of the said matters in difference so referred as aforesaid, as by the said award, reference being thereunto had, will more fully appear. And this the defendant is ready to verify, &c.

JUDGMENT RECOVERED.

Judgment recovered in Q. B., C. P. or Exchequer. (*l*)

9. JUDGMENT RECOVERED.

And the defendant, by Y. Z. his attorney, saith, that the plaintiff hereto-

(*l*) See forms before the rule Hil. T. 4 W. 4, reg. 8; 1 Rich. C. P. 206; 2 Rich. C. P. 19, 20; Morg. 252, 253; Lil. Ent. 158; see a form of judgment recovered by defendant by verdict in trespass, *post*; a form of judgment recovered in an inferior Court in Wales, 3 B. & Cres. 235; a form of judgment recovered at St. Christopher's abroad, 4 B. & Cres. 625; in the Prussian Court of Commerce and Admiralty at Kœnigsberg, *Callander* v. *Dittrich*, 4 M. & G. 68; plea of judgment recovered by assignee of a bankrupt, *Biggs* v. *Cox*, 4 Bar. & Cres. 920; plea that in a former action defendant paid into Court debt and costs in satisfaction, *Power* v. *Butcher*, 10 Bar. & Cres. 329; and as to this plea in general and replication thereto, see 1 Saund. 92, n.

A judgment recovered might, before the Pleading Reg. Gen. Hil. T. 4 W. 4, have been given in evidence in assumpsit under the general issue; 2 Stra. 733; 1 Saund. 67; 2 Bing. 377. But that rule is imperative that judgment recovered *must be pleaded*, and in a particular form when a judgment in another Court is pleaded; and see a form of replication, *post*; and form of new assignment, *post*.

It seems doubtful whether a foreign judgment can be pleaded in bar to an action in this country; see *General Steam Navigation Company* v. *Guillon*, 11 M. & W. 877; *Houlditch* v. *Marquis of Donegal*, 8 Bligh, N. S. 301 (House of Lords.) The plea must at least show that the judgment was conclusive in the foreign country, *Plummer* v. *Woodburne*, 4 B. & C. 625; *General Steam Navigation Company* v. *Guillon*, *supra*; and where the defendant pleaded a judgment recovered in respect of the same cause of action in the Vice-Admiralty Court of Sierra Leone, it was held bad on two grounds; 1st, because the nature of the cause of action was not altered by such a judgment; and 2dly, because there was no allegation that the judgment was conclusive between the parties in the colony, *Smith* v. *Nicholls*, 5 Bing. N. C. 208; 7 Dowl. 282, S. C.; but it seems that a judgment recovered in a foreign Court, upon grounds of prescription or limitation, is an effectual bar to a suit in this country upon the same causes of action, *Callandar* v. *Dittrich*, 4 M. & G. 68; 1 Dowl. N. S. 730, S. C.

A judgment between the same parties, and upon the same cause of action, is in general

JUDGMENT RECOVERED.

fore, to wit, on the —— day of ——, A. D. —— (*m*), in the Court of our said lady the queen [before the queen herself, the same Court then and still being holden at Westminster, in the county of Middlesex,] [*or if the plea be of a judgment recovered in the Common Pleas, say,* " before Sir N. C. T., Knight, and his companions, her Majesty's Justices of the Bench at Westminster, in the county of Middlesex;" *or, if in the Exchequer, say,* " before the Barons of her Majesty's Court of Exchequer at Westminster, in the county of Middlesex"] impleaded (*o*) the defendant in an action on promises to the damage of the plaintiff (*p*) of £—— for the not

The judgment alleged in this plea was signed on the —— day of ——, A. D. 1844. The number of the roll is ——. (*n*)

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conclusive at common law, and if the *cause* of action is the same, it is immaterial that the *form* of action is different. Thus a judgment in *debt* is a bar to an action of *assumpsit* on the same contract; 4 Rep. 94 b. So a judgment in *trover* is a bar to an action of *assumpsit* for the value of the same goods; 2 W. Black. 827; and see Com. Dig. *Action*, K. (3). If the party mistake his *form* of action, and fail on that account, the judgment therein against him would not be conclusive; Cro. Eliz. 668; 2 Saund. 47; 2 J. B. Moore, 157; Roscoe, Evidence, 80, 81.

If a former action failed on the sole ground that it was prematurely brought, the judgment in it is no bar to the subsequent suit; and therefore, where to an action to recover the amount of a deposit on a sale, the defendant pleaded judgment recovered, and it appeared that the plaintiff had sued the defendant for the very same deposit, and the verdict had passed against him, but the evidence showed the ground of that verdict to be that the action was prematurely brought, viz. before the contract was rescinded, and before the defendant had disabled himself from completing it, the former judgment was held to form no obstacle to the recovery when that event had taken place. " It is like an action brought for the price of goods before the credit had expired, which would not prevent a recovery for the same goods after that period;" *Palmer* v. *Temple*, 1 P. & D. 379.

If a judgment be recovered in a former action for want of a plea, &c. it will be considered that plaintiff brought such action and recovered for the causes of action that *might have been recovered* in that form of action, and which he knew of at the time of bringing it; 3 B. & Cres. 235. So if a plaintiff, having several causes of action against a defendant, on the trial offers evidence on those causes and fails, he cannot bring another action for the causes on which he failed; 2 Bing. 382. But if the plaintiff omitted altogether to give any evidence as to them, he may bring another action for them; 6 T. R. 607; 4 T. R. 146. A judgment is only evidence where it is directly upon the point in question, and is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment; 20 How. St. Tr. 533; 1 Salk. 290.

As to the effect of a judgment as regards the parties to it, and privies and strangers, see 1 Stark. Evid. tit. " *Judgment*;" 1 Phil. Evid. 303; Rosc. Evid. 79, 80.

When this plea was as heretofore adopted as a sham plea for delay, the judgment was usually stated to have been recovered in a *different court* to that in which the plea was pleaded, for if the recovery were pleaded in *the same court*, the plaintiff might, instead of replying, crave oyer of the record, or at least a note in writing of the term and number roll, and sign judgment if it were not given in convenient time; Tidd's Prac. 9th ed. 644, 666.

When the plea was pleaded in fraud of a judge's order, plaintiff might sign judgment; 2 Chit. Rep. 292; Tidd, 9th edit. 563.

(*m*) The precise date of the judgment, at least as regards term and year, must be stated accurately; and if the date of the judgment appears to be subsequent to the cause of action, the plea will be bad on general demurrer; *Few* v. *Backhouse*, 1 P. & D. 34.

The plea must, before the rule requiring the date to be shown, have stated the term and Court in which the judgment was recovered; 1 Saund. 329, note l.

(*n*) The Prac. Reg. Gen. Hil. T. 4 W. 4, reg. 8, orders, that where a defendant shall plead a plea of judgment recovered *in another Court*, he shall, in the margin of such plea, state the date of such judgment and the number of the roll, if any. See rule, *ante*, vol. i. 570. But that rule does not extend to a plea by an executor or administrator of a judgment recovered against *him* by another creditor; *Power* v. *Izod*, 1 Bing. N. C. 304; 3 Dowl. 140, S. C. And a plea that in an action in which the now defendant was plaintiff, and the now plaintiff was defendant, the now plaintiff set off the same debt for which the present action was brought, and in that action the now defendant obtained a verdict, is not a plea of judgment recovered within the rule, which appears to have been intended to apply only to the well-known and usual sham plea of a former judgment recovered by the plaintiff against the defendant for the same demand; *Brokenshor* v. *Monger*, 9 M. & W. 111.

(*o*) As to the signification of the term impleaded, see *Robinson* v. *Roland*, 6 Dowl. 271.

(*p*) Be accurate in stating the parties to the judgment; 4 Taunt. 13. If defendant's instead of plaintiff's name be inserted, it would be bad even on *general* demurrer; 7 Taunt. 271; *sed query* that decision.

performing the very same identical promises, and each and every of them in the declaration in this action mentioned, [*or if the former action were in debt, then say* " in an action of debt for the detention of the monies in the said declaration in this action mentioned, and for, upon, and in respect of the contract and causes of action in the declaration in this action above demanded,"] and such proceedings (*r*) were thereupon had in the said Court in that action, that afterwards, to wit, on (*s*) &c. the plaintiff, by the consideration and judgment of the said Court, recovered in the said action against the defendant £—— for his damages which he had sustained, as well on occasion of the not performing the same identical promises in the said declaration mentioned, as for his costs and charges by him about his suit in that behalf expended, [*or if the former action were in debt, say* " the said debt and monies in the said declaration above mentioned, to wit, £——, as also £—— for his damages by him sustained as well by reason of the detention thereof as for his costs and charges by him about his suit in that behalf expended,"] whereof the defendant was convicted, as by the record and proceedings thereof, still remaining in the said Court of our said lady the queen, before the queen herself, (*t*) [*or if in C. P.* " of the bench aforesaid," *or in the Exchequer*, " of the Exchequer aforesaid,"] at Westminster aforesaid, more fully and at large appears, (*u*) which said judgment is still in full force and effect, not reversed, satisfied, or made void. (*x*) And this the defendant is ready to verify by the said record.

JUDGMENT RECOVERED.

And for a further plea in this behalf, the defendant says, that the plaintiff ought not to be admitted to say that the defendant is indebted to the plaintiff upon the causes of action in the —— count of the declaration mentioned, because he says that before the commencement of this suit, to wit, on the —— day of ——, A. D. ——, the now defendant impleaded the now plaintiff in an action on promises in her Majesty's Court of Exchequer, at Westminster, and afterwards, to wit, on the —— day of —— A. D. ——, declared in the said action, and in his declaration, according to the course and practice of the said Court, complained that the now plaintiff was indebted to him in the respective sums of £200, £200, £200 and £200, for and upon the considerations therein mentioned. And the defendant says, that afterwards, to wit, on the —— day of ——, A. D. ——, the now plaintiff by his attorney, amongst other pleas pleaded in the said action, as to the causes of

Plea to action for money had and received, that in a former action brought by the defendant against the plaintiff, the latter had pleaded a set-off in respect of the same money now sought to be recovered, but the jury had found for the plaintiff, on which judgment was given. (*y*)

(*r*) 1 Saund. 92, n. 2.

(*s*) The day of signing judgment, which may now be in vacation.

(*t*) A material averment; 1 J. B. Moore, 19.

(*u*) Willes, 126; Com. Dig. tit. *Pleader*, E. 29.

(*x*) 1 Saund. 330, note 4; 1 Rich. C. P. 205. This allegation is usual, but seems unnecessary, for if the judgment had been reversed or satisfied, the plaintiff must reply that matter specially.

(*y*) When a verdict is found against a defendant on a plea of set-off, he is estopped from suing the plaintiff for the demand specified in the plea of set-off; and a replication that the plaintiff was not prepared to support his plea of set-off at the former trial is bad; *Eastmure* v. *Laws*, 5 Bing. N. C. 444; 7 Dowl. 444; and see *Mondel* v. *Steel*, 8 M. & W. 858. In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract; and to the extent that he obtains or is capable of obtaining an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and he is precluded from recovering in another action to that extent, but no more; *Mondel* v. *Steel*, *supra*.

JUDGMENT RECOVERED.

action in the declaration mentioned [except £50, part thereof,] that the now defendant before and at the time of the commencement of the said action in the said Court of Exchequer, and at the time of pleading the said plea, was indebted to the now plaintiff in £——, for money had and received by the now defendant for the use of the now plaintiff; and that the now plaintiff was ready and willing and did by his said plea offer to set off and allow to the now defendant, out of the last-mentioned sum of money, the full amount of his damages in the said action, part of which last-mentioned sum of money, so pleaded in the said action by the now plaintiff by way of set-off, was the identical sum of money in the now plaintiff's declaration, and for which the now plaintiff has impleaded the now defendant. And the defendant further says, that afterwards, to wit, on the —— day of ——, A. D. ——, the now defendant, by way of replication to the plea of set-off, replied that he was not indebted to the now plaintiff in manner and form as the now plaintiff in his plea of set-off alleged; and thereupon issue was joined between the parties, and such proceedings were thereupon afterwards, to wit, on the —— day of ——, A. D. ——, had, that the jurors of the jury, being summoned in the said action, and having come to speak the truth of the matters in issue in the said action, and being chosen, tried and sworn, did, as to the said issue upon the plea of set-off, say upon their oath that the now defendant was not indebted to the now plaintiff in manner and form as the now plaintiff in his plea of set-off alleged; and afterwards, to wit, in —— term, A. D. ——, the now defendant by the consideration and judgment of the Court recovered in the said action against the now plaintiff the sum of £—— for his damages which he had sustained, as well on occasion of the not performing of the promises in his declaration, as for his costs and charges by him in that behalf expended, whereof the now plaintiff was convicted, as by the record and proceedings thereof still remaining in the said Court of Exchequer at Westminster more fully and at large appear; which judgment still remains in full force and effect, and not in the least reversed or made void. And this the now defendant is ready to verify by the said record; wherefore he prays judgment if the now plaintiff ought to be admitted to say that the now defendant was indebted to him upon the causes of action in the [—— count of the] declaration mentioned.

To assumpsit on a policy of assurance by the assignees of a bankrupt, plea as to parcel &c. that the policy was made in Scotland, and that the said sum was duly fenced and arrested, according to the law of Scotland at the suit of G. for a

And for a further plea in this behalf as to £78 : 14*s.* parcel of the said sum of £2000, the defendants say, that the said policy of insurance and promise were made and entered into in that part of the United Kingdom of Great Britain and Ireland called Scotland, to wit, at Leith, and that at the time of the making and entering into the same and thence continually hitherto, the defendants were and have been and still are resident and domiciled in Scotland, to wit, at Leith, and within the jurisdiction of her Majesty's Court of Session in Scotland, that after the time of the happening of the alleged loss and damage, and before the commencement of this suit, and before the said T. P. became bankrupt, to wit, on &c., the said sum of £78 : 14*s.* was duly fenced and arrested according to the law of Scotland, (*x*) in the hands

(*x*) It is not necessary to set out the Scotch law; *M'Leod* v. *Schultze*, 1 D. & L. 614. See averment of the issuing of letters of "horning and poinding" from the Court of Session in Scotland, *Hay* v. *Fisher*, 2 M. & W. 722.

JUDGMENT RECOVERED.

of the Forth Marine Insurance Company, and of the defendants as such members and directors thereof, by and at the suit of a certain company or copartnership, established and carrying on business in Scotland aforesaid by and under the name of The Glasgow Marine Insurance Company; that is to say, by virtue of a certain warrant or letter of arrestment of our sovereign lady the Queen then issued out of and by her said Court of Session in Scotland aforesaid, at the instance of the said The Glasgow Marine Insurance Company, in a certain suit commenced and then depending in her said Majesty's Court of Session in Scotland aforesaid, in which the said The Glasgow Marine Insurance Company were the pursuers, and the said T. Pitcairn was the defender, for the recovery of a certain debt of £78 : 14*s.* then due and owing by the said T. P. to the said The Glasgow Marine Insurance Company, and which said parcel of the said sum of £78 : 14*s.* parcel &c., was so fenced and arrested as aforesaid, to remain in the hands of the said Forth Marine Insurance Company and of the defendants as such directors and members thereof under sure fence and arrest, aye and until sufficient caution should be found acted in the books of council and session, that the same should be made forthcoming to the said The Glasgow Marine Insurance Company, pursuers as aforesaid, as accorded of law; and the defendants further say that thereupon the said sum of £78 : 14*s.* parcel &c. as aforesaid, became and was according to the law of Scotland and hath ever since continued in the custody of the law, and subject in all respects to the order and determination of her Majesty's said Court of Session in Scotland aforesaid; and the defendants further say, that such proceedings were afterwards had in the said last-mentioned suit, that afterwards and before the commencement of this suit, to wit, on &c., the said The Glasgow Marine Insurance Company, as such pursuers as aforesaid, obtained a final judgment and decree of and in the said Court of Session in Scotland aforesaid in the said suit, whereby the said Court, to wit, the Lords of her Majesty's Council and Session in Scotland, did decree and ordain the said T. P. to make payment to the said The Glasgow Marine Insurance Company of the sum of £78 : 14*s.* sterling money of Great Britain with the legal interest thereof, from &c. and thereafter during the non-payment of the same &c. And the defendants further say that the said debt of £78 : 14*s.* was justly due and owing by the said T. P. to the said The Glasgow Marine Insurance Company at the time of the commencement of the said suit, and that the said Court had jurisdiction in and over the said suit and the subject-matter thereof, and that the said suit and the proceedings therein were duly and regularly prosecuted and conducted according to the law and practice of the said Court of Session, and according to the law of Scotland aforesaid, and that the said warrant or letter of arrestment and judgment were and are respectively final and conclusive against T. P. and the plaintiffs as his assignees, and that by virtue of and according to the law of Scotland, and by the said arrestment, and by reason, and were and always from the the time of the making of the said arrestment, hitherto have been and still are liable to make forthcoming, and to pay to the said The Glasgow Marine Insurance Company the said sum of £78 : 14*s.* parcel &c.; and that by the law of Scotland at the time when the said T. P. became bankrupt, he the said T. P. was not entitled to have, sue for or recover the said sum of £78 : 14*s.* parcel &c.; and that the said T. P. and the plaintiffs as such assignees were

debt due to him; that G. afterwards obtained final judgment, whereby, according to the law of Scotland, the plaintiffs were precluded from suing, and were by reason of the premises wholly barred.

JUDGMENT RECOVERED.

and have been always from the time of making the said arrestment, hitherto and still are, by the law of Scotland aforesaid, wholly prevented and precluded from claiming, suing for or recovering the said sum of £78 : 14*s.* parcel &c. as aforesaid; and that by the law of Scotland aforesaid all right and claim of the said T. P. in or to the said sum of £78 : 14*s.* parcel &c. were before and at the time of the commencement of this suit, and before and at the time when the said T. P. became bankrupt, and thence hitherto have been and still are by reason of the premises wholly barred, defeated and destroyed, and the plaintiffs, as assignees as aforesaid, never acquired any right or title thereto or to any part thereof. And the defendants further say, that the said debt so recovered by the said The Glasgow Marine Insurance Company as aforesaid, in manner aforesaid, is still unpaid, and that before and at the time of the commencement of this suit the defendants were, and thence always hitherto have been and still are, by the law of Scotland, liable and bound to pay the said sum of £78 : 14*s.* parcel &c. to the said The Glasgow Marine Insurance Company, in discharge of the said debt so recovered by them in manner in this plea before-mentioned, and that by making payment to the plaintiffs of the said sum of £78 : 14*s.* parcel &c. or of any part thereof, they the defendants would be guilty of a contempt of the said Court of Session, and not only liable to punishment, but would also be compelled to pay the full amount of the said sum of £78 : 14*s.* parcel &c. to the said The Glasgow Marine Insurance Company. And this the defendants are ready to verify, &c.

10. RELEASE.

RELEASE. (*a*)

Release.

And the defendant, by Y. Z. his attorney, saith, that after the making of the said promises in the said declaration mentioned, and before the com-

(*a*) See forms, 2 Rich. C. P. 70; Morg. 237. A release might, before the Pleading Rules, H. T. 4 Will. 4, have been given in evidence under the general issue, or pleaded with it, Gilb. C. P. 64; Doug. 106, 107; 3 Esp. Rep. 234; Ld. Raym. 566. 787; 12 Mod. 377; 3 Burr. 1353; Cases Pr. C. P. 154; Barnes, 328, S. C.; but since those rules a release must be pleaded specially. In order to release one of several obligors or covenantors without releasing the other, the proper course is merely to execute a deed *covenanting* not to sue the other except merely for the purposes of joinder; 8 Term Rep. 168; see form of covenant, 4 Chitty's Commer. Law. A plea of release in an action by the payee against the acceptor of a bill of exchange, must aver that the release was *after* the acceptance; *Ashton* v. *Freestun*, 2 M. & G. 1. In an action for a partnership debt, a covenant not to sue, entered into by one only of the plaintiffs, cannot be set up as a release, and the rule of law that a covenant not to sue is equivalent to a release (on the principle of avoiding circuity of action) does not apply to such a case; *Walmsley* v. *Cooper*, 11 A. & E. 216; 3 P. & D. 149, S. C. A Court of law has no jurisdiction to set aside a release which is good in law, but in the exercise of its equitable jurisdiction it may interfere to prevent a defendant from pleading a release where it would be a manifest fraud on a third party seeking to enforce a demand against the defendant, and where the defendant himself is a party to the fraud; *Phillips* v. *Claggett*, 11 M. & W. 84.

Where a party who has different distinct claims executes a release, and it appears that he can only legally sign in one character, it must be taken that he signed in that character; *Lanyon* v. *Davey*, 11 M. & W. 218. See plea of release by one of the plaintiffs for himself and partner, in an action on a policy of insurance, *Wilkinson* v. *Lindo*, 7 M. & W. 81.

It is no answer to a plea of release of one of two joint obligors, that the release was given with an undertaking on the part of defendant, the other obligor, that the release should not operate in his discharge; *Cocks* v. *Nash*, 9 Bing. 341. But where the terms of a guarantee expressly state that the plaintiff may compound, &c. with the principal without discharging the surety, the latter cannot set up a composition deed whereby the plaintiff granted a general release to the principal; *Cowper* v. *Smith*, 4 M. & W. 519. By the release of a debt by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt; and therefore the relinquishment of such security

Release.

mencement of this suit, to wit, on &c. (*b*) the plaintiff, by his certain deed poll, [*or* "indenture," *according to the fact,*] sealed with his seal, and now shown to the said Court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, [*or if the deed have been lost, instead of the profert, say* "which said deed poll [*or* "indenture,"] having been lost and destroyed by accident, the defendant cannot produce the same to the said Court here," (*c*)] did remise, release, and for ever quit claim unto the defendant, his heirs, executors and administrators, the said several promises and alleged causes of action in the said declaration mentioned, [*or sometimes the full terms of the release are stated, but this is not necessary, and the better form is to plead the release according to its effect as a release of the causes of action stated in the declaration,*] as by the said release, reference being thereunto had, will fully appear. And this the defendant is ready to verify, &c.

Release to another co-contractor. (*d*)

And the defendant, by ——, his attorney, as to the first count of the said declaration, saith, that the promise therein mentioned was made jointly by the defendant and by two other persons with him, to wit, by the defendant and by one T. S. and one B. S., and whereby the defendant and the said T. S. and B. S. jointly and severally promised and contracted as in that count mentioned; and the defendant further saith, that heretofore and after the making of the said promise, to wit, on &c. by a certain indenture then made between the plaintiff of the first part, and the said B. S. of the second part, and which indenture, sealed with the seal of the plaintiff, the defendant now brings here into Court, the plaintiff then, without the defendant's consent, released to the said B. S. the said cause of action, claim and demand upon and in respect of the said promise in the said first count mentioned, and thereby then also released the defendant from the same. And this the defendant is ready to verify, &c.

Plea, that *additional credit* was given, and additional security taken by the plaintiff, without the knowledge of the defendant, the guarantee. (*e*)

And for a further plea in this behalf, as to the first count of the declaration, the defendant says, that after the said goods had ben so supplied, sold, and delivered by the plaintiff to the said G. H. as aforesaid, and after the said

for the benefit of the debtor forms no consideration for a parol promise by the debtor to pay the residue of the debt beyond the amount of the composition received under the deed; *Cowper* v. *Green*, 7 M. & W. 633.

(*b*) The date of the release.

(*c*) Where in a plea of deed of composition and release of the defendant from all debts, &c., *excuse* of profert was made and the replication set out the indenture in *hæc verba*, and it appeared that the release was of debts set forth in a schedule of the indenture, it was held that as the indenture was not set out on *oyer*, but in *hæc verba*, it was not to be taken as part of the plea, and therefore the plea was not bad for omitting to state that the debt was mentioned in the schedule of the indenture; *Hyde* v. *Watts*, 1 Dowl. & L. 479.

(*d*) See the note to the last precedent, and *Brooks* v. *Stuart*, 1 P. & D. 615. Where to a plea of release by the plaintiffs of a co-contractor with the defendants, the plaintiffs replied *non est factum*, to which the defendants rejoined "that the said deed *is* the deed of the plaintiffs," on which issue was joined, it seems that this issue would be supported by the production of the release in a cancelled state, it having been cancelled by the releasee, after the plea was pleaded, but before issue joined; *Todd* v. *Emly*, 11 M. & W. 1.

(*e*) *Howell* v. *Jones*, 1 Crom. M. & Ros. 97; *Coombe* v. *Woolf*, 8 Bing. 156; 1 Chit. Gen. Prac. 129. Taking a warrapt of attorney from A., to secure the amount of a promissory note by A. and the defendant, unaccompanied by any binding engagement on the part of the plaintiff to give time to A., does not discharge the defendant; *Bell* v. *Banks*, 3 M. & G. 258, and see form of plea there. See plea by guarantee, in action on a promissory note by trustees of a loan society, that the defendant was not to be sued until default of principal, and law thereon, *Brown* v. *Langley*, 4 M. & G. 466.

RELEASE.

credit so agreed on as aforesaid between the plaintiff and the said G. H. had elapsed, to wit, on &c. it was agreed by and between the plaintiff and the said G. H., without the consent, leave or license of the defendant so being such surety and guarantee as aforesaid, that the plaintiff [*if there was a consideration, here state it, as thus:* "for and in consideration of the said G. H. then agreeing to pay the plaintiff interest at £5 per cent. for such further time,"] should give to the said G. H. time, and forbear to sue him for the payment of the price of the said goods supplied, sold and delivered by the plaintiff to the said G. H. as aforesaid, for a certain time, to wit, until the said bill of exchange hereinafter mentioned to have been drawn by the plaintiff upon the said G. H., should become due according to the tenor and effect thereof; and that for securing the payment of the said prices of the said goods so supplied, sold and delivered by the plaintiff to the said G. H. as aforesaid, at the expiration of that time, the plaintiff should draw upon the said G. H., and that the said G. H. should accept a certain bill of exchange bearing date a certain day and year, to wit, the day and year last aforesaid, and payable at a certain time, to wit, two months after the date thereof, to the order of the plaintiff. And the defendant further says, that in pursuance of such agreement the plaintiff then drew, and the said G. H. then accepted, the said bill of exchange for securing the payment of the said sum of £——, being the said price of the said goods so supplied, sold and delivered by the plaintiff to the said G. H. as aforesaid, without the defendant's leave, license or consent; and the said G. H. then delivered the said bill to the plaintiff so accepted as aforesaid; and the plaintiff then had and received the same in pursuance of and according to the said agreement, for and on account of the price of the said goods so supplied, sold and delivered as aforesaid, by the plaintiff to the said G. H. as aforesaid. And this the defendant is ready to verify, &c.

SET-OFF.

11. SET-OFF. (*f*)

Observations.]—The *law* of set-off, founded on the statute 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 4, continues the same as heretofore, excepting as respects the necessity *for pleading it*, for it is no longer competent to a defendant to give a *notice* of set-off, but a *set-off must be pleaded*, though credit be given for the amount in the plaintiff's particulars of demand; *Rowland* v. *Blakesley*, 2 G. & D. 734; and see *ante*, vol. i. 595.

Plea of set-off. (*g*)

And for a further plea in this behalf, the defendant saith, that the plaintiff, before and at the time of the commencement of this suit, was and still

(*f*) See forms, 2 Rich. C. P. 25, 26; Morg. 250; to an action by an executor, 2 Rich. C. P. 32. See a plea of set-off founded on an *agreement* where the debts were not due in the same right, or to the same parties, 2 Taunt. 170. As to when a set-off may be pleaded, see *ante*, vol. i. 595 to 602. A set-off cannot be pleaded to an action for unliquidated or unascertained damages; *Seale* v. *Barrett*, 4 Nev. & Man. 201; *Auber* v. *Lewis*, Man. Index, 2d edit. 251; and unliquidated losses on a policy of assurance cannot, it seems, be made the subject of set-off; *Thomson* v. *Redman*, 11 M. & W. 487.

(*g*) Where a defendant under a plea of set-off to the whole declaration proves a sum of money owing to him from the plaintiff, less than the amount of the claim which the plaintiff has established, the defendant is not entitled to have a verdict entered for him on that issue for the amount which he has so proved, but the issue must be found for the plaintiff, unless where the defendant by all

Set-offs.

is (*i*) indebted to the defendant in a large sum of money, to wit, the sum of £——, [*enough to cover the defendant's set-off,*] for [*here state subject-matter of the set-off according to the fact. The usual allegations are as in the following precedents, and when they do not apply, the set-off may be stated as in the counts in indebitatus assumpsit, ante, vol. ii. pages 36 to 66. The following is the usual statement of a set-off for work and labour, goods sold, and money lent, paid, had and received, interest, and on an account stated.*] For work done and materials for the same provided by the defendant for the plaintiff at his request, and for goods, chattels and effects sold and delivered [*or,* "bargained and sold,"] by the defendant to the plaintiff at his request, and for money by the defendant before that time lent and advanced to, and paid, laid out and expended for the plaintiff at his request, and for money by the plaintiff before that time had and received for the use of the defendant and for money due and owing from the plaintiff to the defendant for interest upon and for the forbearance by the defendant to the plaintiff at his request, for divers long spaces of time, of monies due from the plaintiff to the defendant, and for money due and owing from the plaintiff to the defendant upon an account then stated between them. (*k*) Which said sum [*or* "sums"] of money so due to the defendant as aforesaid exceeds [*or* "exceed"] the damages sustained by the plaintiff by reason of the nonperformance by the defendant of the said several alleged promises in the said declaration mentioned, and out of which said sum [*or* "sums"] of money so due to the defendant, the defendant is ready and willing and hereby offers to set-off and allow to the plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

Work and materials. Goods sold.

Monies lent, paid, and had and received.

Interest.

Account stated.

Usual conclusion.

And for a further plea, the defendant saith, that the said E. F. [*the deceased,*] before and at the time of his death, was indebted to the defendant

Plea of set-off to an action by an executor or administrator. (*l*)

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his pleas taken together covers the whole cause of action; *Tuck* v. *Tuck*, 5 M. & W. 109. In the latter case, the other pleas are to be taken distributively, and the plea of set-off is to be applied to that part of the plaintiff's demand not met by the other pleas, and the issue on it found wholly for the defendant; for it signifies not whether the plaintiff's demand be reduced by failure of proof or by the establishment of one or more of the other pleas on the record, independent of the plea of set-off. If by either means the plaintiff's demand ultimately established falls short of the defendant's demand, the issue on the plea of set-off ought be found wholly for the defendant, so that in no case can the plea of set-off be properly said to be divisible; *Moore* v. *Butlin*, 7 A. & E. 601. As to distinguishing the counts to which this plea is pleaded, see *ante*, 98, note (*x*).

(*i*) These words are necessary, and "at the time of the plea pleaded," would be bad; *Brady* v. *Powell*, 6 Dowl. 577. And see 4 Nev. & Man. 654; 3 T. R. 186; 1 East, 716.

(*k*) Where on the 5th of February an account was stated between the parties, and the balance was in favour of the plaintiff, and on the 10th of March another account was stated, and the balance was in favour of the defendant, and the plaintiff afterwards sued on the first account stated, it was held that the defendant could not under the plea of non-assumpsit avail himself of the defence of the second account, as that must be taken to be either a payment or a set-off; *Fidgett* v. *Penny*, 1 C. M. & R. 108; but see *Thomas* v. *Hawkes*, 8 M. & W. 140.

(*l*) Where to an action of debt by a husband and wife in right of the wife as executrix for money had and received, the defendant pleaded, as to 35*l.*, that that sum was part of the prices received by him upon the sales of two horses of the testator which were in the hands of the plaintiffs to be administered, and which, under an authority given by them to the defendant, were sold by him in his own name, and warranted sound to the respective purchasers [naming four persons]; that at the time of the sale the horses respectively were unsound; that the defendant from the time of the receipt of the money until he paid the same as thereinafter mentioned, was indebted to the plaintiffs in the sum of 35*l.*, payable on request, for the said money so received by him for their use, and always was ready and

SET-OFF.

in the sum of £——, for [*here state the subject-matter of the set-off, in which the deceased was indebted to defendant, as ante* 115, *or according to the facts, and proceed thus :*] Which said sum of money, before and at the time of the commencement of this suit, was and still is unpaid and due from the plaintiffs as executors [*or* "as administrators"] as aforesaid, to the defendant, and exceeds the damages sustained by the plaintiffs as executors [*or* "administrators"] as aforesaid, by reason of the nonperformance by the defendant of the said several supposed promises in the declaration mentioned, and out of which said sum of money so due to the defendant, he is ready and willing and hereby offers to set off and allow to the plaintiffs as executors [*or* "as administrators"] as aforesaid, the full amount of the said damages, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

Plea of set-off in action against executors or administrators.

And for a further plea in this behalf, the defendant saith, that the plaintiff, before and at the time of the death of the said E. F., was indebted to the said E. F. in £——, for [*here state the subject-matter of the set-off due to the deceased.*] Which said sum of money is still due and owing from the plaintiff to the defendants as executors [*or* "administrators"] as aforesaid, and exceeds the damages sustained by the plaintiff by reason of the nonperformance of the said several supposed promises in the said declaration mentioned, and out of which said sum of money so due from the plaintiff as aforesaid, the defendants are ready and willing and hereby offer to set off and allow to the plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

Plea of set-off, or *mutual credit*, in action by assignees of a bankrupt. (*m*)

And for a further plea in this behalf, the defendant saith, that the said E. F. [*the bankrupt*] before and at the time of his bankruptcy, was, and from thence hitherto hath been, and still is indebted to the defendant in £——, for [*here state the subject-matter of the debt due from the bankrupt as usual, and proceed thus :*] Which said sum of money before and at the time of the commencement of this suit was and still is due to the defendant as aforesaid, and exceeds the damages sustained by the plaintiffs as assignees as aforesaid, by reason of the nonperformance by the defendant of the said several alleged promises in the said declaration mentioned, and out of which said sum of money so due to the defendant as aforesaid, he the defendant is ready and willing, and hereby offers to set off and allow to the plaintiffs the full amount of the said damages, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

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willing to pay it to them; and that after he so became indebted, and before the commencement of the suit, he was, by reason of the breaches of the warranties as to the said horses, compelled by the said persons who so purchased them, without any fault on his part, to repay and did necessarily repay to them the said sum of 35*l.*, and the residue of the prices, whereby the said debt of 35*l.* was discharged; it was held, on special demurrer, that the plea was no answer to the action; *Field* v. *Allen*, 9 M. & W. 694.

(*m*) In an action by the assignees of a bankrupt for a *chose in action* belonging to the wife of the bankrupt before marriage, the defendant cannot set off a debt due to him from the bankrupt; *Yates* v. *Sherrington*, 11 M. & W. 42.

SET-OFF.

Plea of *mutual credit* to assumpsit by assignees. (*n*)

And for a further plea, as to the first count of the declaration, the defendant saith, that before and at the time of the date and issuing forth of the fiat in bankruptcy, under and by virtue of which the said E. F. was found and adjudged to be such bankrupt as aforesaid, to wit, on &c. the said E. F. was indebted to the defendant in £——, for money by the defendant before then lent to the said E. F. at his request, and which said last-mentioned sum of money still remains unpaid and unsatisfied to the defendant; and the defendant further saith that he had not, when he gave credit to the said E. F. in respect of the said last-mentioned sum of money, or any part thereof, notice of any act of bankruptcy by the said E. F. committed, which said sum of money so due, unpaid and unsatisfied to the defendant as aforesaid exceeds any demand of the said E. F. before his said bankruptcy, and of the plaintiffs as assignees as aforesaid since the said bankruptcy, in respect of the matters in the first count alleged, of all which premises the plaintiffs had notice before and at the time of the commencement of this action, and out of and against which said sum so due, unpaid and unsatisfied to the defendant as aforesaid, the defendant is ready and willing, and hereby offers, to allow and set off the full amount of such demand. And this the defendant is ready to verify, &c.

Plea that the defendant discounted a bill of exchange for the bankrupt, and set off to that amount.

See plea, *Alsager* v. *Currie*, 11 M. & W. 14, and *Replication, post.*

Plea to action for money had and received to the use of the assignees since the bankruptcy, that the defendant before the bankruptcy had indorsed and discounted bills of exchange for the bankrupt, and the latter in consideration drew a bill of exchange on a bank and gave it to the defendant by way of loan to raise the amount, and that the amount so received by the defendant is the sum claimed by the plaintiffs, and offer to set off. (*o*)

And for a further plea in this behalf, as to so much of the declaration [*or* "—— count"] as relates to the sum of £97 : 10*s.*, parcel &c. of the monies in the declaration [*or* "that count"] mentioned, the defendant says, that long before he the defendant had notice that any act of bankruptcy had been committed by the said J. S., and long before any fiat of bankruptcy issued against the said J. S., and before the commencement of this action, to wit, on &c., the defendant gave credit to the said J. S. to the amount of £50, by indorsing, for the accommodation of the said J. S. and at his request, and without any consideration paid or given to him the defendant for so doing, a certain bill of exchange, drawn by the said J. S. upon M. & Co. for £50, and payable to the order of the said J. S., which said bill the said J. S. afterwards, and before any notice to the defendant of his said bankruptcy, to wit, on &c. negotiated and transferred for value. And the defendant further says, that afterwards, and long before the defendant had any notice that any act of bankruptcy had been committed by the said J. S., and before the date or issuing of any fiat of bankruptcy against the said J. S.,

(*n*) As to mutual credit, see 6 Geo. 4, c. 16, s. 50. The Reg. Gen. Hil. T. 4 W. 4, order that a *set-off* or *mutual credit* shall be pleaded; though before, the latter might have been given in evidence under non-assumpsit. See *mutual credit* pleaded, *Gibson* v. *Bell*, 1 Bing. N. C. 743.

A declaration by assignees of a bankrupt that in consideration that the bankrupt before his bankruptcy would sell certain goods to the defendant, the defendant agreed to pay for the same prompt two months, or by an acceptance, containing an averment of delivery of the goods and of the defendant's refusal to pay by an acceptance or otherwise, whereby the bankrupt was deprived of the use and benefit of an acceptance, and of all the benefit which would have resulted from discounting the said acceptance, and was put to great loss and inconvenience, and his estate, applicable to the discharge of his just debts, was, by reason of the nonpayment for the said goods, much diminished in value, does not sound in unliquidated damages so as to deprive the defendant of his right to set-off under the above section of 6 Geo. 4, c. 16; *Groom* v. *West* 8 Ad. & E. 758; 1 P. & D. 19, S. C.

(*o*) See *Hulme* v. *Muggleston*, 3 M. & W.

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and also long before the commencement of this suit, to wit, on &c. the defendant gave credit to the said J. S. in and to a certain other large amount, to wit, £50, by discounting for the said J. S., at his request, a certain other bill of exchange, drawn by the said J. S. on M. and Co. for £50, payable to the order of the said J. S., and indorsed by the said J. S., which said bill the defendant afterwards and before any notice to him of the bankruptcy of the said J. S. indorsed, negotiated and transferred for value. And the defendant says that the said credits so respectively given by him to the said J. S. as aforesaid were credits of a nature extremely likely to end in debts from the said J. S. to the defendant, and amounting together to a large sum, to wit, the sum of £100. And the defendant further says, that afterwards, and before the commencement of this suit, to wit, on &c., the defendant was called upon and obliged to pay and satisfy the two bills of exchange above mentioned to certain persons being respectively the holders thereof, in consequence of the said bills having been dishonoured by the acceptors thereof respectively when they became due, of which the defendant had due notice. And thereupon, and before the commencement of this action, the said J. S. became, and at the time of the commencement of this action was and still is, indebted to the defendant in a large sum of money, to wit, the sum of £100, being the amount of the last-mentioned bills of exchange, for money paid by the defendant for the use of the said J. S. at his request, which said last-mentioned sum of money is the same identical sum in and for the amount of which the defendant had given credit to the said J. S. as aforesaid. And the defendant further says that before the bankruptcy of the said J. S., and also before the commencement of this action, to wit, on &c. he the said J. S. drew his bill of exchange in writing, and directed the same to the C. Banking Company, and thereby ordered the said C. Banking Company to pay to himself or bearer the sum of £97 : 10*s*., and the said J. S. then and before the bankruptcy of him the said J. S. delivered the same to the defendant by way of loan, in order that the defendant might receive the amount of the same, and thereby then gave credit to the said defendant to and in the amount of the same, and the defendant afterwards, before the bankruptcy of the said J. S., and also before the commencement of this action, to wit, on &c. presented the said last-mentioned bill of exchange for payment to the said drawees thereof, and the defendant afterwards, and after the bankruptcy of the said J. S., but before the commencement of this action, to wit, on &c. received from the said drawees of the said bill of exchange the said sum of £97 : 10*s*., being the amount of the said last-mentioned bill of exchange, which said sum of £97 : 10*s*. so received by the defendant is the same sum of £97 : 10*s*. in the introductory part of this plea and in [the second count of] the declaration mentioned, and the damages sustained by the plaintiffs by reason of the non-performance of the premises by the defendant in respect

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30; and see similar plea in *Russell* v. *Bell*, 8 M. & W. 277. Where to a count for money had and received to the use of assignees of a bankrupt, the defendant pleaded that although the money mentioned remained and was in the possession of the defendant after the bankruptcy, yet that it was in fact received before the issuing of the fiat, and from thence remained in the defendant's possession; that before and at the time of the issuing of the fiat, the bankrupt was indebted to the defendant in a larger sum, and that at the time he so gave credit to the bankrupt, he had no notice of any act of bankruptcy; it was held that this was not a good ground for a set-off (which the plea concluded with), and that it was therefore bad; *Wood* v. *Smith*, 4 M. & W. 522; 7 Dowl. S. C.

thereof, and out of which said sum of £100 the defendant is ready and willing and hereby offers to set off and allow to the said plaintiffs the full amount of the said damages, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c. SET-OFF.

Commencement and conclusion of plea of set-off as ante, 114, 115.] Upon a certain judgment which he the defendant heretofore, to wit, on &c. in the Court of our said lady the queen, before the queen herself [*or if in C. P. say* "before her majesty's justices of the bench at Westminster, in the county of Middlesex," *or in Exchequer*, "before the barons of her majesty's Court of Exchequer at Westminster,"] recovered against the plaintiff in a certain action on promises, whereby it was considered and adjudged that the defendant should recover against the plaintiff the said sum of £——, for his damages which he had sustained, as well by reason of the not performing of certain promises before then made by the plaintiff to the defendant, as for his costs and charges by him about his suit in that behalf expended, (*q*) whereof the plaintiff was convicted, as by the record and proceedings thereof remaining in the said Court of our said lady the queen before the queen herself [*or in C. P.* "in the said Court of our said lady the queen of the Bench aforesaid," *or in Exchequer*, "in the said Court of her majesty's Exchequer aforesaid,"] more fully appears, which said judgment still remains in full force and effect, not reversed, annulled, discharged, satisfied, or made void, and which he the defendant is ready to verify by the said record, [*if any further sum be due to defendant besides that on the judgment, here insert it. It may be as well also here to state a set-off on the consideration for the judgment:*] Which said sum of money so due to the defendant as aforesaid exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant of the said several supposed promises in the said declaration mentioned, and out of which said sum of money so due to the defendant he the defendant is ready and willing and hereby offers to set off and allow to the plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided. And this he the defendant is ready to verify, &c. Plea of set-off on a judgment. (*p*) Verification by the record.

Commencement and conclusion of plea of set-off as ante, 114, 115.] Upon and by virtue of a certain recognizance, he the plaintiff having, before the commencement of this suit, to wit, on &c. come in his own proper person into the Court of our said lady the queen, before the queen herself [*or if in C. P.*, "into the Court of our said lady the queen of the Bench,"] the said On a recognizance in another Court, and on simple contract. (*r*)

(*p*) See the forms, 3 Wentw. 160, 161; *Amor v. Cuthbert*, 3 M. & G. 1. The record of the judgment must be referred to, but the plea is to conclude with a general verification, as in this precedent. In *Strudwick v. James*, M. 4 G. 4, a similar plea was demurred to specially for concluding with a general verification, (Tindal for plaintiff, Chitty for defendant,) and after argument the Court held the plea sufficient, it containing a verification by the record, and as the question of fact, whether more was due to the plaintiff than the debt on the judgment, might properly be tried by the country, the general concluding verification was sufficient on the part of the defendant; the following cases were cited, viz. a similar form in *Jaques v. Withy*, 1 T. R. 557, and 22 MSS. 260, 324; Hob. 244; Say. 208, 301; 3 Wentw. 161; and see 1 B. & Ald. 153. Defendant cannot set off a judgment in which he has taken the plaintiff in execution, 5 M. & S. 103; and plaintiff may reply such taking; 2 Chit. Rep. 303, *sed quære*.

(*q*) The judgment is to be described according to the fact.

(*r*) *Quære*, whether if this be pleaded as a dilatory plea, the Court may not be with

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Court then and still being holden at Westminster, in the county of Middlesex, and then in the said Court acknowledged himself to owe to the defendant the sum of £——, to be paid to the defendant when he the plaintiff should be thereunto afterwards requested, which said sum of £—— he the plaintiff, for himself and his heirs, then consented and granted should be made of his and their lands, goods and chattels, and should be levied to the use and behoof of the defendant, [*according to the recognizance,*] and which said recognizance is still in full force, strength and effect, not paid off, annulled, or satisfied, as by the said recognizance remaining of record in the said Court of our said lady the queen, before the queen herself, will fully appear, and which he the defendant is ready to verify by the said record. (*s*) And the defendant further saith, that the plaintiff, at the time of the commencement of this suit, was and still is indebted to the defendant in the further sum of £——, for &c. [*Set-off on money counts, as ante,* 114, 115.

Verification by the record.

On simple contract.

For rent due on a lease. (*t*)

Commencement and conclusion of plea of set-off as ante, 114, 115.] Upon a certain indenture of lease, heretofore, to wit, on, &c. [*date of lease,*] made between the defendant of the one part, and the plaintiff of the other part, (the counterpart of which said indenture, sealed with the seal of the plaintiff, the defendant now brings here into Court, the date whereof is the day and year last aforesaid,) whereby the defendant demised certain premises and tenements, with the appurtenances therein mentioned, to the plaintiff, for a certain term of years therein mentioned, to wit, for the term of —— years, from, &c. yielding and paying during the said term the yearly rent or sum of £——, on certain days therein mentioned, to wit on, &c. and in and by which indenture he the plaintiff convenanted with the defendant to pay him the said rent of £—— on the days aforesaid, of which said rent afterwards, to wit, on &c. a large sum of money, to wit, the said sum of £—— for —— years of the said term then elapsed, became and was and still is in arrear and unpaid from the plaintiff to the defendant.

Set-off on a bond. (*u*)

Commencement and conclusion of plea of set-off as ante, 114, 115.] Upon and by virtue of a certain writing obligatory, made by the plaintiff heretofore, to wit, on &c. [*date of bond,*] and sealed with his seal, and now shown to the Court of our said lady the queen, before the queen herself, [*or in C. P.* "to her majesty's justices here," *or in Exchequer,* "to the barons of her majesty's said Court of Exchequer,"] the date whereof is the day and year last aforesaid, whereby the plaintiff became held and firmly bound unto the defendant in the penal sum of £——, to be paid to the defendant when he the plaintiff should be thereunto afterwards requested, which said writing obligatory was and is conditioned for the payment of a certain sum of money,

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success moved for leave to sign judgment, as it contains matter of record and simple contract; 2 M. & Sel. 606; and in 5 B. & Ald. 750. Where defendant pleaded this plea the Court allowed judgment to be signed. See replication to this plea, 1 B. & Ald. 154.

(*s*) If the recognizance be enrolled, it should be so stated, as a recognizance is not a record till enrolled; 1 Inst. 260 a.; 1 B. & Ald. 153.

(*t*) If rent be due on a lease, the set-off should not be for use and occupation, but as above. See Bull. Ni. Pri. 179.

(*u*) See the form, 1 Wils. 155; 5 T. R. 133. When the debt on either side accrues by reason of a *penalty* contained in any bond or specialty, the set-off must be *pleaded*, and the sum really due must be stated in the plea; 8 Geo. 2, c. 24, s. 4; 2 Geo. 2, c. 22, s. 13; 3 T. R. 65; 6 T. R. 460.

to wit, the sum of £——, at a certain time therein mentioned, and which had elapsed before the commencement of this suit, and which said writing obligatory, at the time of the commencement of this suit, was and still is in full force and effect, not released, paid off, satisfied, cancelled, or otherwise made void, and at the time of the commencement of this suit there was and still is justly and truly due from the plaintiff to the defendant, upon the said writing obligatory, by the condition thereof, a certain sum of money, to wit, the said sum of £——, [*the sum first alleged to be due.*

On a bill accepted by plaintiff.

Commencement and conclusion of plea of set-off as ante, 114, 115.] Upon a certain bill of exchange, bearing date, to wit, the —— day of —— A. D. ——, heretofore, to wit, on the day and year last aforesaid, made and drawn by the defendant upon and then accepted by the plaintiff, whereby the defendant requested the plaintiff, [two] months after the date thereof, to pay to him the defendant, or his order, the sum of £——.

On a bill indorsed by plaintiff to defendant.

Commencement and conclusion of plea of set-off as ante, 114, 115.] And also in the further sum of £—— of like lawful money, upon a certain other bill of exchange, bearing date, to wit, the —— day of —— A. D. ——, heretofore, to wit, on the day and year last aforesaid, drawn by the plaintiff upon one E. F., whereby he the plaintiff requested the said E. F. two months after the date thereof, to pay to the plaintiff, or his order, the sum of £—— for value received, which said bill of exchange the plaintiff then indorsed and delivered to the defendant, and which said bill of exchange, when the same became due and payable, according to the tenor and effect thereof, to wit, on &c. [*day it fell due,*] was presented and shown to the said E. F. for payment thereof, but the said E. F. then neglected and refused to pay the said sum of money in the said bill of exchange specified, whereof the plaintiff afterwards, to wit, on the day and year last aforesaid, had notice.

On a promissory note made by plaintiff.

Commencement and conclusion of plea of set-off as ante, 114, 115.] And also in the further sum of £—— upon a certain promissory note in writing, bearing date, to wit, &c. [*the date*] heretofore, to wit, on the day and year last aforesaid, made by the plaintiff, and whereby he the plaintiff then promised to pay, [two] months after the date thereof, to the defendant, or his order, the sum of £—— for value received.

On a promissory note indorsed by plaintiff to defendant.

Commencement and conclusion of plea of set-off as ante, 114, 115.] And also in the further sum of £—— upon a certain promissory note in writing, bearing date, to wit, &c. [*the date*] heretofore, to wit, on the day and year last aforesaid, made by one E. F., and whereby he, the said E. F. then promised to pay, [two] months after the date thereof, to the plaintiff, or his order, the sum of £—— for value received, and which said promissory note he the plaintiff then indorsed and delivered to the defendant, and which said promissory note, when the same became due and payable, according to the tenor and effect thereof, to wit, on, &c. [*day it fell due*], was presented and shown to the said E. F. for payment thereof, but the said E. F. then neglected and refused to pay the said sum of money in the said promissory note specified, whereof the plaintiff afterwards, to wit, on the day and year last aforesaid, had notice.

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Commencement and conclusion of plea of set-off as ante, 114, 115.] For the use and occupation of a certain messuage and premises, with the appurtenances, of the defendant by the plaintiff, and at his request, and by the sufferance and permission of the defendant, for a long time then elapsed, had held, used, occupied, possessed and enjoyed.

For use and occupation. (y)

First plea, non assumpsit; second plea, to the count for goods sold.] Saith that the said goods, wares and merchandizes in the said [*first count mentioned,*] were with the knowledge, privity and consent of the plaintiff, sold and delivered to the defendant by one J. S. being then the agent and factor of and for the plaintiff, in his the said J. S.'s own name, as the true and sole owner thereof, and as and for his the said J. S.'s own proper goods, wares and merchandizes, and that the plaintiff did not appear nor was he known by the defendant at or before the time of the said sale or delivery of the said goods, wares and merchandizes to the defendant as the proprietor of the same, or that he, the plaintiff, was in any wise interested therein; and the defendant further says, that he then bought and accepted and received the said goods, wares and merchandizes of and from the said J. S. as the proper goods, wares and merchandizes of him the said J. S.; and that credit for the said goods, wares and merchandizes was given to the defendant by the said J. S., and not by the plaintiff. (a) And the defendant further says, that the said J. S. before and at the time of the sale and delivery of said goods, wares and merchandizes, and thence continually hitherto, was and still is indebted to the defendant in a large sum of money, to wit, the sum of £—— for money before then paid by the defendant for the said J. S., at his request, and for other money before then had and received by the said J. S. for the use of the defendant: and for other money, wherein the said J. S. was found to be in arrear to the defendant upon an account then stated between them, [*so stating the cause of set-off as usual,*] which said sum of money so due and owing from the said J. S. to the defendant as aforesaid exceeds the sums of money so due and owing from the defendant to the plaintiff, upon and by virtue of the causes of action in the said [*first*] count of the said declaration mentioned, and out of which said sum of money so due and owing from the said J. S. to the defendant as aforesaid, he, the defendant, is ready and willing, and hereby offers to set-off and allow to the plaintiff, the full amount of the said sums of money so due and owing from the defendant to the plaintiff, upon and by virtue of the causes of action in the said [*first*] count of the said declaration mentioned, and this he, the defendant, is ready to verify, &c.

Plea to action for goods sold, that they were sold by *plaintiff's factor as a principal*, plaintiff being unknown to defendant, and that at the time of the contract the defendant had a set-off against the factor. (z)

And the defendant as to the first count of the declaration, so far as the same relates to the sum of £23, parcel of the sum of money therein men-

Another form of a similar plea to part of a count,

(y) If the rent be due on a lease, the form must be as *ante*, 120.

(z) That this is a good plea, and that the facts may be specially pleaded, see *Purchell* v. *Salter*, 1 G. & D. 686; *Carr* v. *Hinchcliffe*, 4 B. & C. 547; 7 D. & R. 42, S. C.; *George* v. *Clagett*, 7 T. R. 359. See form of replication suggested in 4 B. & C. 547, and 7 D. & R. 42, S. C. The plaintiff cannot reply *de injuria*, because the plea is not in excuse, and also because it sets up authority from the plaintiff; *Salter* v. *Purchell*, in error, 1 G. & D. 693, over-ruling the judgment of the Court below.

(a) *Quere* whether the legal effect it not, that the plaintiff, by his agent, did give credit. In another MS. form those words were omitted.

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for goods sold and delivered. (b)

tioned, says, that the plaintiff sold and delivered the said goods in that count mentioned, so far as the same relates to the said £23, parcel &c. as aforesaid, to the defendant by and through the medium of one G. M., who, at the time of such sale and delivery, was the factor and agent of the plaintiff in that behalf, and intrusted by him with the said last mentioned goods; and the said G. M. so being such factor or agent, and intrusted as aforesaid, with the consent of the plaintiff, sold the said last mentioned goods to the defendant in his the said G. M.'s own name, as the true and sole owner of the said last mentioned goods, and as and for his the said G. M.'s own proper goods, and the said G. N. then appeared to be such true and sole owner by the plaintiff's consent, and the plaintiff did not appear nor was he known by the defendant at or before the time of the said sale, as the proprietor of or to be interested in the said last mentioned goods; and the defendant then bought and received the said last mentioned goods of and from the said G. M. as his the said G. M.'s proper goods, and did not know and had not the means of knowing that the plaintiff was the owner of the said last mentioned goods, or interested therein, or that the said G. M. was only an agent in that behalf. And the defendant further says, the said G. M. before and at the time of the said sale, was and from thence continually hitherto had been and still is indebted to the defendant in a large sum of money, to wit, the sum of £30 for the price and value of certain goods and chattels, and of divers horses, mares and geldings, and divers pigs and swine, before then sold and delivered by the defendant to the said G. M. at his request, and for money found to be due from the said G. M. to the defendant on an account before that time stated between them; which said sum of money so due to the defendant exceeds the damages by the plaintiff sustained by reason of the non-performance of the promises in the declaration mentioned so far as the same relates to the sum of £23, parcel &c. and out of which said sum of money so due to the defendant, he the defendant is ready and willing and hereby offers to set off and allow to the plaintiff the full amount of the said last-mentioned damages. And this the defendant is ready to verify, &c.

Plea, that the promises were made by defendant and J. L. jointly, and that plaintiff was indebted to the defendant and J. L. (c)

And the defendant, by ——, his attorney, says, that the said several promises in the declaration mentioned were and each of them was made by the defendant jointly with one J. L., who is still alive, and not by the defendant alone, and that the plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the defendant and the said J. L. in a large sum of money, to wit, in the sum of £——, [for the use and occupation of a certain messuage and premises with the appurtenances, of the defendant and the said J. L. by the plaintiff, and at his request, and by the sufferance and permission of the defendant and the said J. L. for a long time then elapsed, had held, used, occupied, possessed and enjoyed, and for the price and value of goods before then sold and delivered by the defendant and the said J. L. to the plaintiff, at his request, and for money before then lent by

(b) See *Purchell* v. *Salter*, 1 G. & D. 682.

(c) This plea was held good on special demurrer; *Stackwood* v. *Dunn*, 3 G. & D. 115. Where A. and B. as partners sued the defendants for work and labour done in the matter of an executorship, it was held that the defendants could not set off money received by A. before the partnership on account of the testator's estate, although B. had at that time assisted A. in the matter of the executorship, and A. after the partnership had admitted the receipt of the money; *France* v. *White*, 6 Bing. N. C. 33.

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the defendant and the said J. L. to the plaintiff, at his request, and for money before then paid by the defendant and the said J. L. for the use of the plaintiff, at his request, and for money then received by the plaintiff for the use of the defendant and the said J. L.; and for money found to be due from the plaintiff to the defendant and the said J. L. on an account before then stated between them,] which said sum of money, so due and owing to the defendant and the said J. L. as aforesaid, exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant and the said J. L. of the said several promises in the declaration mentioned, and out of which said sum of money, due and owing by the plaintiff to the defendant and the said J. L. as aforesaid, the defendant and the said J. L. are ready and willing and hereby offer to set off and allow to the plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

Set-off, deduction, or retainer at common law.

Observations.] See Montague's Law of Set-off, 1 to 3; as to *connected* accounts and set-off *at common law, ante*, vol. i. 595, 602; 2 Taunt. 170; 3 Taunt. 176; see form of such plea, 2 Taunt. 170. Pleas of agreed set-off at common law, Chitty, jun. Precedents, 211 to 214; plea of agreement that defendant should retain in discharge of a cross debt, *id.* 358. Plea, by an accommodation acceptor, of retainer to indemnify himself, *id.* 360 Plea of set-off under a special agreement of a debt due from one of the plaintiffs to the defendant, *id.* 392. Plea that defendant bought goods of plaintiff's factor, as the apparent principal, and a set-off of a debt from factor to defendant, *id.* 394.

Plea as to a sum of £45, parcel &c. due for work and materials, under an agreement whereby it was *stipulated that the defendant was to deduct a sum per week*, if the work was not completed on a certain day.(*d*)

And for a further plea in this behalf, as to the sum of £45, other than the said sum of £——, and parcel of the said sum of £225, parcel of the said first mentioned sum of £500 in the said declaration mentioned, and in which the defendant is alleged to have been indebted to the plaintiff for the price and value of work done and materials for the same provided, and the defendant's promise in respect of the same, the defendant says, that the said work and labour was done and the said materials for the same were provided by the plaintiff for the defendant at the price and value of the said sum of £225, under and by virtue of a certain contract and agreement theretofore, to wit, on the &c. made and entered into between the plaintiff and the defendant, whereby it was agreed &c. [*here set out the substance of the agreement.*] And the defendant in fact saith, that the plaintiff did omit to complete the said works by the said —— day of ——, A. D. ——, and a long time, to wit, five weeks, were occupied by the plaintiff after that day in completing the said works, whereupon and whereby the defendant then became and was, under and by virtue of the said contract and agreement, and still is, entitled to deduct and does deduct from the said price and value

(*d*) It seems doubtful whether this plea does not amount to the general issue. See *Cleworth* v. *Pickford*, 7 M. & W. 314. Where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter, not of set-off, but of deduction; *Turner* v. *Diaper*, 2 M. & G. 241.

of the said work and materials in the said declaration mentioned, so far as respects the said sum of £225, the sum of £5 for the first week, and £10 for the second and every other of the said weeks so occupied by the plaintiff after the —— day of ——, A. D. ——, in completing the said works, amounting together to the said sum of £45. And this the defendant is ready to verify, &c.

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JURISDICTION OF INFERIOR COURTS.

12. JURISDICTION OF INFERIOR COURTS.

Plea of the Westminster Court of Requests Act, 6 & 7 W. 4, c. 137, (local and personal.) (e)

And for a further plea in this behalf, the defendants says, that this action was commenced after the 10th day of October next after the making of a certain act of parliament, made and passed in the session of parliament held in the 6th and 7th years of the reign of his late majesty, King William the Fourth, intituled "An Act to repeal two Acts of the reign of King George the Second for the Recovery of Small Debts within the City and Liberty of Westminster, and for Granting more effectual Powers for that purpose;" and the defendant further says that he never was indebted to the plaintiff in any sum exceeding the sum of 40s. (f) in respect of the causes of action in the declaration mentioned, or any or either of them; (g) and that at the time of the commencement of this action, he the defendant was an inhabitant and resident within the jurisdiction of the said Court of Requests in the said act of parliament mentioned, and then was and still is liable to be warned or summoned before the said Court of Requests. And the defendant further

(e) See 9 A. & E. 499, as to how this plea should be framed. This act repeals the 23 Geo. 2, c. 27, and 24 Geo. 2, c. 42. Sect. 87 enacts, "That no action or suit for any debt not exceeding the sum of 40s., and recoverable by virtue of this Act in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other Court whatsoever." The proper mode of taking advantage of a Court of Requests Act depends entirely upon the language of the particular statute. Sometimes the act is required to be specially pleaded, sometimes it may be given in evidence under the general issue, and sometimes the proper course is to apply to enter a suggestion to deprive the plaintiff of his costs where a verdict for less than the amount over which the Court has jurisdiction is obtained on the trial. As to when a suggestion is traversable, see *Watson* v. *Quilter*, 11 M. & W. 760. Where a Court of Requests Act provided that if any person should commence any action in any of the superior Courts, against any person residing within the jurisdiction of the Court of Requests, for any debt, &c. which upon *the trial* should be found not to amount to 40s. *no judgment should be* entered *on the* verdict, and if it were entered should be void, and the defendant should have costs, it was held that a defendant could not take advantage of the act by suggestion on the roll, but was bound to plead it in bar of the action; Jackman v. *Cother*, 5 M. & W. 147. Where by the provisions of an act double costs are given to the defendant, where an action is brought in the Courts of Record at Westminster, and a verdict found for less than 40s., *quære*, whether it applies to a verdict on a plea collateral to the merits of the action, as a plea *puis darrein continuance* of a release to a joint contractor with the defendant; *Todd* v. *Emly*, 11 M. & W. 610. The County Court of *Middlesex* cannot be pleaded; *Lonsdale* v. *Bennett*, 2 Adol. & El. 204; 4 Nev. & Man. 89; 3 Dowl. 294. The language of the plea depends on the different acts. See a form of plea of the Court of Requests for the Tower Hamlets, *Dupries* v. *Snell*, 1 Tyr.

(f) An averment that the defendant was not indebted to the plaintiff in a greater amount than "£1 : 13s. : 8d.," is bad, as no material issue could be taken on such an averment, inasmuch as though the defendant should be found indebted in a greater amount than £1 : 13s. : 8d., yet if the amount were under 40s. the case would be equally within the jurisdiction of the inferior Court; *Burroughs* v. *Hodgson*, 9 A. & E. 499; 1 P. & D. 328, S. C. Under the Courts of Request Acts, the sum recovered by verdict, and not the amount claimed, is to be considered the debt in dispute; *Fairbrass* v. *Pettit*, 1 D. & L. 622.

(g) As to the impropriety of the words "if any such there be," see *Sandall* v. *Bennett*, 2 Adol. & El. 204; *Margetts* v. *Bays*, 4 Ad. & Ell. 489. *Quære*, whether the plea should answer the damages; *Broadhurst* v. *Groundsell*, 1 Dowl. & L. 229.

JURISDICTION OF INFERIOR COURTS.

saith, that the debt due and owing from the defendant to the plaintiff, and not exceeding the sum of 40*s.* as aforesaid at the time of the accruing of the said debt, and at the time of the commencement of this suit, was and still is recoverable, under and by virtue of the said act of parliament, in the said Court of Requests in the said act mentioned. And this the defendant is ready to verify, &c.

STATUTE OF LIMITATIONS.

13. STATUTE OF LIMITATIONS.

Non-assumpsit infra sex annos. (*i*)

And for a further plea in this behalf, the defendant saith, that the defendant [*or if by an executor, say,* "the said E. F. deceased,"] did not at any time within six years next before the commencement of this suit, promise in manner and form as the plaintiff hath above thereof complained against him. Wherefore the defendant prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof. (*k*)

Actio non accrevit infra sex annos. (*l*)

And for a further plea in this behalf, the defendant saith, that the said several alleged (*m*) causes of action in the said declaration mentioned did not, nor did any or either of them accrue [to the plaintiff] (*n*) at any time within six years next before the commencement of this suit, in manner and form as the plaintiff hath above thereof complained against him the defendant. Wherefore the defendant prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof. (*k*)

(*i*) See the older forms, Lil. 32; 2 Rich. C. P. 16, 32; Morg. 217. This form may still be adopted to an indebitatus count, and in all other cases where the money is payable immediately, but it would be demurrable if there be not an immediate cause of action, and the next form must be adopted; *Leaper* v. *Tatton*, 16 East, 421; 1 Saund. 33, n. 2, 283, n. 2; 2 Saund. 63, n. 6; Selwyn's Nisi Prius, 10th edit. 135.

The statute of limitations must be pleaded in assumpsit, though the declaration state the promise to have been made above six years before the title of the declaration; 2 Saund. 63, n. 6; 1 Saund. 283, n. 2. But where the statute is not pleaded, still the jury may presume, from length of time and other circumstances, that the debt has been satisfied; 2 Stark. 497; 5 Esp. 52; 1 Taunt. 572; but see 1 D. & R. 19. Where there are counts in the declaration on promises by or to executors, assignees, &c., the plea of the statute of limitations must, if intended to apply to those counts, be so framed as to answer them; 2 Saund, 63 d; 2 Stra. 919; 2 Hen. Bla. 561; and if not intended to apply to those counts, it should be qualified in the introductory part.

Upon a contract to indemnify an accommodation acceptor, the statute begins to run from the time at which the plaintiff is damnified by actual payment; *Reynolds* v. *Doyle*, 1 M. & G. 753; and see *Colvin* v. *Buckle*, 8 M. & W. 680, as to the operation of the statute on a guarantee under the special circumstances there stated. See also, *post* "*Replications to Pleas of the Statute.*"

When a part of the plaintiff's demand is recoverable, the defendant should pay the same into Court, and plead the statute of limitations as to the residue; *Long* v. *Greville*, 3 Bar. & Cres. 10; 4 Dowl. & Ry. 682. As to the effect of pleading the statute to the whole or part of the declaration, see *ante*, 98, note (*x*).

(*k*) This plea need not conclude with a verification; *Bodenham* v. *Hill*, 7 M. & W. 274; 8 Dowl. 863, S. C.; and see *Attwood* v. *Taylor*, 1 M. & G. 288, n. (*a*); but it must nevertheless be signed by counsel; *Roberts* v. *Howard*, 1 Dowl. N. S. 667. See also *Spong* v. *Wright*, 9 M. & W. 629.

(*l*) See forms, Plead. A. 451; 1 Rich. C. P. 149. See note to the preceding form. This plea is necessary whenever the declaration contains a count on a cause of action which did not accrue until after the making of the contract, and will suffice in all cases, and seems in general preferable to the preceding precedent; 2 Saund. 63 d; 1 Saund. 33; 16 East, 421.

(*m*) A plea that the said several *supposed* causes of action in the declaration mentioned did not accrue, &c. is good, for *supposed* is equivalent to alleged; *Eavestaff* v. *Russell*, 10 M. & W. 365.

(*n*) Omit these words, if the action be at the suit of executors. If at the suit of the assignee of a bankrupt, see 2 Saund. 63 d, n.

By and against Executors, Administrators, &c.

III. PLEAS IN ACTIONS BY AND AGAINST EXECUTORS, ADMINISTRATORS, ASSIGNEES, &c.

1. By and against Executors and Administrators.

C. D. ats. A. B. } The defendant, by ——, his attorney, saith, that the said E. F. in his lifetime, [*and if there be counts in the declaration on the defendant's promise, say,* " and the defendant since his decease,"] did not [nor did either of them,] promise in manner and form as the plaintiff hath above thereof complained. And of this the defendant puts himself upon the country, &c.

General issue that neither the testator nor the defendant promised.

And the defendant, by ——, his attorney, except as to the sum of £17 : 10*s.*, parcel of the several monies in the declaration mentioned, says, that the said E. F. deceased, did not promise in manner and form as the plaintiff hath above thereof complained against him the defendant; and of this the defendant puts himself upon the country, &c. And as to the said sum of £17 : 10*s.*, parcel &c. and the said promise and cause of action in respect thereof, the defendant says, that he cannot deny but that the said E. F. did promise in manner and form as the plaintiff hath above, as to the said sum of £17 : 10*s.* parcel &c. complained against him; nor but that the plaintiff hath sustained damages on occasion of the not performing the said promise as to the said sum of £17 : 10*s.*, to a large amount, to wit, to the amount of the said sum of £17 : 10*s.* And for a further plea in this behalf, as to the said sum of £17 : 10*s.*, the defendant saith, that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith that he hath fully administered, &c. [*Same as the plea of plene administravit, post,* 131, *to the end; or as the plea of plene administravit præter, a named sum, post,* 132.

Plea, by executor or administrator, of non-assumpsit, except as to a named part admitted to be due; and a plea of *plene administravit* as to the sum admitted to be due. (*o*)

And for a further plea in this behalf, the defendant saith, that he never was executor of the last will and testament of the said E. F. deceased, nor

Defendant *ne unques executor.* (*p*)

(*o*) When the defendant, executor or administrator, can ascertain the precise amount of the debt due, and is certain that he has not any assets towards payment of the same, this is the best course of pleading. If the defendant raise assets sufficient to pay the sum due, then, instead of the second plea, the defendant should plead payment into Court of the sum due.

(*p*) If the defendant intends to deny his being executor or administrator, he must plead such denial specially as above, for unless pleaded, his representative character is admitted; Reg. Gen. Hil. T. 4 W. 4, reg. 21. If the defendant intends denying that he has taken upon himself the burthen of the execution of the will, he should plead accordingly; *id. ibid.*; 1 M. & P. 677. The plea of *ne unques executor* may be pleaded in bar as above; Com. Dig. Pleader, 2 D. 7; 3 Salk. 1; 2 Ld. Raym. 1207; 1 Saund. 274, n. 3. If the probate was taken out, but not till after action brought, the above plea will not suffice; 3 C. & P. 123. The plea of *ne unques executor* does not deny the cause of action, but only denies that the defendant is one of the representatives of the testator; 1 Saund. 207, n.

As to the plea that the plaintiff is not executor, see 2 Stark. Evid. 548. See the forms, Rast. Ent. 322 a, 329 b, pl. 10, 330 a; Co. Ent. 144 b; Lib. Plac. 427, pl. 27; 6 Wentw. 293, *id.* ind. xxvi.; 1 Rich. C. P. 454. See *ib.* pleaded in abatement, 1 Went. 14.

A plea that defendant is *administrator*, not executor, is in abatement. Under this plea the defendant might formerly give in evidence that there were *bona notabilia* in other dio-

By and against Executors, Administrators, &c.

ever administered (*q*) any of the goods or chattels which were of the said E. F. deceased, at the time of his death, as executor of the last will and testament of the said E. F. deceased, in manner and form as the plaintiff hath above in his said declaratiou in that behalf alleged. And this the defendant is ready to verify (*r*), &c.

Defendant *ne unques administrator*. (*s*)

And for a further plea (*t*) in this behalf, the defendant says that he is not nor ever hath been administrator of the goods or chattels, rights or credits, which were of the said E. F. deceased, in manner and form aforesaid, as the plaintiff hath above in that behalf alleged. And this the defendant is ready to verify, &c. (*r*)

Plaintiff *ne unques administrator* after craving oyer of letters of administration. (*u*)

D. ats. B. suing as administrator, &c. } The defendant, by ——, his attorney, craves oyer of the alleged letters of administration, and they are read to him in these words &c. [*set them out verbatim*] which being read and heard, the defendant says, that the plaintiff is not, nor ever hath been, administrator of the goods or chattels, rights or credits, which were of the said E. F. deceased, in manner and form as the plaintiff hath above in that behalf alleged. And this the defendant is ready to verify, &c.

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ceses, for it confesses and avoids, and does not falsify the seal of the ordinary ; 1 Saund. 274, 275. See 5 B. & Cres. 492; *infra*, note (*u*); 1 Salk. 297, 298; 5 Mod. 145. But now it is advisable to plead specially; see plea, *post*, 129. If this plea, or a release to the defendant himself be falsely pleaded, *semble*, that the defendant will be liable *de bonis propriis*, 1 Saund. 336; Wight. 18; Toller, 2d edit. 463, 474; Williams' Executors, 3rd edit. 1554, where see as to pleas by executors in general. Whenever the action against an executor or administrator can only be supported against him in that character, and he pleads a plea which admits that he has acted as such (except a release to himself), the judgment against him is that the plaintiff do recover the debt and costs to be levied of the assets, if the defendant have so much, but if not, then the *costs* out of the defendant's own goods.

The plea of *ne unques executor* may be pleaded with non-assumpsit and with *plene administravit*, &c.; Fortes. 336; Com. Dig. Pleader, E. 2. If there be any doubt whether the defendant may not have made himself executor *de son tort*, it is dangerous to plead *ne unques executor*, because it may render the defendant personally liable for the debt and costs, though he may not have assets to the amount; 1 Saund. 336 b, n. 10.

(*q*) This seems proper, because a person who has administered or interfered, not being a legal *administrator*, may be sued as an *executor* generally; 1 Saund. 265, n. 2.

(*r*) It has been usual to conclude this plea with a verification, and the Court of Queen's Bench has lately decided that such a conclusion is proper.

(*s*) See the notes to the preceding form. This is a good plea in bar; Com. Dig. Plead. 2 D. 13; and as a person cannot be sued as administrator *de son tort*, it is not necessary in this plea to aver that the defendant never administered; 6 T. R. 551. *Semble* if the deceased made a will, that fact must be pleaded specially, and that it was proved; and it must then be traversed that he died intestate; see form, Plowd. 282; Com. Dig. Administrator, B. 1; 2 Saund. 47 n. The pleas usually conclude with a verification. If the plea be that defendant is executor, not administrator, see 1 Salk. 297; 5 Mod. 145.

(*t*) See *ante*, 127, note (*p*).

(*u*) In an action of assumpsit by an administratrix upon a promissory note, given to her intestate, it was averred in the declaration as usual, that administration of the effects of intestate was duly granted by the Bishop of C., and the above plea was pleaded; and issue being joined, the letters of administration granted by the Bishop of C. were produced by the plaintiff, but it was also proved that the intestate, at the time of his death, had *bona notabilia* in another diocese, in a different province, and no evidence was given as to the residence of the defendant at the death of the intestate: it was held, first, that the letters of administration were not void, inasmuch as the other diocese in which the intestate had *bona notabilia* was in a different province; and secondly, that the only question raised upon the issue was, whether the letters of administration were duly granted by the Bishop of C., and that it was no part of the issue whether the defendant, at the death of the intestate, resided within the diocese of C. The fact of his residence elsewhere, if relied upon, ought to have been specially pleaded; 5 B. & C. 491; 8 D. & R. 247, S. C.

The defendant, by Y. Z. his attorney, saith, that the plaintiff, as to the said several alleged causes of action in the said declaration mentioned, (*x*) is not nor ever was administratrix of the goods, chattels and effects which were of the said J. W. deceased, in manner and form as the plaintiff hath above in her said declaration in that behalf alleged. And this the defendant is ready to verify, &c.

By and against Executors, &c.

Plaintiff *ne unques administrator* as to causes of action contained in declaration. (*x*)

And for a further plea in this behalf, the defendant saith, that the said Hannah was at the time of her death possessed of divers goods and chattels, rights and credits, which were bona notabilia in divers dioceses in the province of Canterbury, (that is to say,) of divers goods and chattels to the value of £5 and upwards within the diocese of the Bishop of Gloucester, and of divers other goods and chattels to the value of £5 and upwards within the diocese of the Bishop of Bristol, by reason whereof the said letters of administration were and are void and of no effect in law. And this the defendant is ready to verify, &c.

Plea to an action by an administrator, that the intestate had bona notabilia in divers dioceses. (*y*)

As to this plea, see *Wentworth* v. *Cock*, 2 P. & D. 251.

Plea of death of testator or intestate, after making the agreement and before breach.

And for a further plea in this behalf, except as to the last count of the said declaration, the defendant saith, that the said E. F. [*the deceased*] in the said declaration mentioned, in his lifetime, to wit, on &c. duly made and published his last will and testament in writing, and thereof constituted and appointed the defendant, the plaintiff, and one G. H. joint executors thereof, and afterwards, to wit, on &c. the said E. F. died without altering or revoking his said last will and testament; and this he the defendant is ready

Plea as to all the counts except the last, that testator appointed the plaintiff and the defendant and another joint executors. (*z*)

(*x*) See 5 B. & C. 491, 497, and the observation of Bayley, J. and form, 5 B. & C. 492. Where K. being left executor, M., as his attorney, obtained letters of administration to the testator's effects, with the will annexed, for the benefit of K., who never took out probate; and K. died, having appointed an executor, and S. took out administration with the will of the first testator annexed, and also administration with the will of K. annexed, for the benefit of K.'s executor, till that executor should himself obtain probate, M. being still living, and the goods of the first testator not fully administered: it was held, that during the lifetime of K. the goods of the first testator vested not in him but in M., as the personal representative of the first testator; but that after K.'s death M. ceased to be such representative, and consequently that arrears of interest becoming due to the estate of the first testator in K.'s lifetime, were not recoverable in assumpsit by S., as his personal representative, but that S. might by virtue of the administration taken out by him, bring assumpsit for such arrears accruing after the administration was granted; *Suwerkrop* v. *Day*, 8 A. & E. 624.

(*y*) To an action of covenant on a deed by the plaintiff as administrator of D. by virtue of letters of administration granted by the Archbishop of Dublin, a plea that D. at the time of his death was an inhabitant of Dublin, and had *bona notabilia* in the diocese of London, is not an issuable plea; but if it had been shown that at D.'s death the deed sued on was within the diocese of London, it might be pleaded in bar or in abatement; *Huthwaite* v. *Phaire*, 1 M. & G. 159. Letters of administration from the Archbishop of Canterbury are sufficient to enable a person to sue in this country on an indenture which at the time of the intestate's death was in Ireland, as assets in any diocese in Ireland are to be considered as assets abroad, when the administrator sues in an English Court under a prerogative administration, and therefore a plea to a declaration setting out letters of administration from the Archbishop of Canterbury, that the deceased died in parts beyond the seas, and that at the time of the intestate's death the indenture sued on was at Dublin, and not in the province of Canterbury, was held bad; *Whyte* v. *Rose*, *in error*, 2 G. & D. 312, overruling the judgment of the Court below, 4 P. & D. 199. And a metropolitan administration of goods within a peculiar, if not valid, is at least voidable only, and not void; *Lysons* v. *Barrow*, 2 Bing. N. C. 486. A policy of insurance is assets wherever the deed was at the time of the death of the insured; *Gurney* v. *Rawlins*, 2 M. & W. 87.

(*z*) As to the validity of this plea, see 2 B. & P. 124, 125. The plaintiff might reply that he did not prove the will, see 3 T. R. 557.

BY AND AGAINST EXECUTORS, &c.

to verify, &c. And for a further plea in this behalf, as to the said last count of the said declaration, the defendant saith, that the said alleged promise in the said last count mentioned (*a*) was made by the defendant together with plaintiff and the said G. H. jointly, and not by the defendant separately, or without the plaintiff and the said G. H. And this the defendant is ready to verify, &c.

Plea to the last count of the declaration, that any promise was made by defendant with the plaintiff and G. H., and concluding in bar.

Plea in bar to an action against an executor, that there were other contracting parties besides the testator, and who survived the testator. (*b*)

And for a further plea in this behalf the defendant says, that the said several alleged promises in the said declaration mentioned (*b*) were and each and every of them was made by the said E. F. in his lifetime, jointly with certain other persons, to wit, G. H. and I. K., who have survived the said E. F. and are still living, and not by the said E. F. alone, as by the said declaration is above supposed. And this the defendant is ready to verify, &c.

Usual plea of *plene administravit*. (*c*)

First plea, general issue.] (*d*) And for a further plea in this behalf, the defendant saith, that he [hath fully administered all and singular the goods and chattels which were of the said E. F. deceased, at the time of his death, and which have ever come to the hands of the said defendant as executor [*or* "as administrator"] as aforesaid, to be administered, and that he the defendant (*e*)] hath not, nor at the time of the commencement of this suit, (*f*) or at any time since, (*g*) had any goods or chattels which were of the said E. F. deceased, at the time of his death, in the hands of the defendant as

(*a*) The words "if any such there were," although not unusual, would, if here introduced, be demurrable.

(*b*) Where a contract made by two or more persons was *joint*, and not *joint and several*, and one of them dies, the remedy survives, and only the survivor can be sued *at law*, and not the executor of the deceased; *ante*, vol. i. 58; 5 East, 261. The interest in a promissory note given to a wife during coverture, the consideration for which was money advanced by her during the coverture, survives to the wife after the death of her husband, unless he reduce it into possession in his lifetime; and to an action on the note by the executor of the wife, a plea that the note was given to the testatrix during her coverture, and that the consideration was money lent by the testatrix during her coverture, and that the defendant was liable to be sued by the representative of the husband, is bad; *Gaters* v. *Madeley*, 6 M. & W. 423.

(*c*) See the forms, 2 Saund. 220; 2 Rich. C. P. 10, 246. If the defendant have any assets in hand, he should plead *plene administravit præter*, as in the form, *post*, 131. In an action against an executor of an executor, the plea must show a due administration by *each*; 10 East, 315.

(*d*) Unless there be some sufficient ground on which the plaintiff's demand may be disputed, it is not advisable to plead *non assumpsit* or any other plea disputing the debt; 2 Bl. Rep. 1275; 1 Saund. 336 b. Where the defendant pleads *non assumpsit* and *plene administravit*, if the plaintiff take judgment of assets in *futuro* upon the latter plea, and go to trial upon the plea of *non assumpsit*, he will be entitled to costs if he obtain a verdict, and therefore in such case, unless the defendant has a good ground of defence upon *non assumpsit*, it is usual for him to apply for leave to withdraw his plea, which the Court or a judge will permit him to do on payment of costs; 2 Bl. Rep. 1275; 9 B. & C. 655; Tidd, 9th edit. 980. But if an executor plead several pleas, and the plaintiff take issue on them, and any one of them be a bar to the action (as *plene administravit*, or the like) and be found for the defendant, he will be entitled to the costs of the trial; 1 B. & Ald. 254; 8 Taunt. 129; 9 B. & C. 657, *acc.* *Sed vide* 13 East, 232; 5 East, 261.

On a plea of *plene administravit* by several executors, if some are shown to have assets in hand, and the others not, the latter are entitled to a verdict; Mo. & Mal. C. N. P. 330.

(*e*) The words within the brackets, "*that the executor had fully administered the goods*," &c. are usually inserted, but it has been said are superfluous, and that the more formal and correct way of pleading is to omit these words; 2 Saund. 220, n. 3; *Reeve* v. *Ward*, 2 Bing. N. C. 235; 2 Scott, 396, S. C.

(*f*) This is material; 2 Saund. 216, n. 1, 220, n. 3; 4 East, 508. Under this allegation the defendant may give in evidence any due administration of assets; 1 Esp. Rep. 314.

(*g*) Material, 3 East, 375; Cro. Jac. 132; and as to the replication to it, see 6 T. R. 11; *post*.

executor [*or* "as administrator"] as aforesaid, to be administered. And this he is ready to verify, &c.

Plene administravit, by the executor of an executor. (*h*)

The defendant, by Y. Z. his attorney, saith, that the said G. H. [*the first executor*] in his lifetime did fully administer all and singular the goods and chattels which were of the said E. F. [*the first testator*] deceased, at the time of his death, and which ever came to the hands of the said G. H. [*the first executor*] as such executor, to be administered; and that he the defendant [*the executor of the executor*] hath fully administered all and singular the goods and chattels which were of the said E. F. [*the first testator*] deceased, at the time of his death, and which have ever come to the hands of the defendant, as executor as aforesaid, to be administered; (*i*) and that the defendant hath not, nor at the time of the commencement of this suit, or at any time since, had any goods or chattels which were of the said E. F. [*the first testator*] deceased, at the time of his death, in the hands of the defendant as executor as aforesaid, to be administered. And this the defendant is ready to verify, &c.

Plene administravit præter. (*k*)

And for a further plea in this behalf, except as to the sum of £——, (*l*) parcel of the monies in the declaration mentioned, the defendant saith, that he hath fully administered all and singular the goods and chattels which were of the said E. F. deceased, at the time of his death, and which have ever come to the hands of the defendant, as executor [*or* "as administrator"] as aforesaid, to be administered, except goods and chattels of the value of £——, [*or* "except the said sum of £——,"] and that he the defendant hath not, nor at the time of the commencement of this suit, or at any time since, had any goods or chattels which were of the said E. F. deceased, at the time of his death, in his hands to be administered, except the said goods and chattels of the value aforesaid, [*or* "the said sum of £——"].* And this the defendant is ready to verify.

Plea of retainer by an executor. (*m*)

And for a further plea in this behalf, the defendant saith, that the said E. F. in his lifetime, to wit, on &c. [*date of bond*] the —— day of ——,

(*h*) The above is the form of the *amended* plea in *Wells and Fidell*, 10 East, 315. If administrator plead the general issue and plene administravit, and plaintiff take issue thereon, instead of praying judgment of assets quando, &c. and such plea be found for defendant, the latter is entitled to the general costs of the cause; *Iggulden* v. *Terson*, 2 Dowl. 277.

(*i*) It is necessary to aver that the first executor had fully administered; 10 East, 315.

(*k*) See the forms, Rast. Ent. 323 a; 3 Wentw. 211, 214.

(*l*) Some of the forms pray judgment generally, Rast. Ent. 323; 3 Went. 211; others do not commence, but only conclude with a prayer of judgment, except as to the assets acknowledged; 3 Wentw. 211, 214. The latter precedent also avers the bringing the money into Court, at the asterisk, as thus: * "*And the defendant brings here into Court the said sum of £——, ready to be paid to the plaintiff*," see 3 Wentw. 211 to 214; but this is unnecessary, for the assets confessed may be goods or a leasehold interest, not capable of being brought into Court. The same precedent also admits a liability to costs, but this is incorrect, for if the plea be true, the defendant is not liable to costs.

(*m*) See forms, 1 Saund. 333; 3 Wentw. 219, 244; *Id.* Index, xxvi. to xxxiii.; 2 Rich. C. P. 230, 254. A retainer may be pleaded specially, or it may be given in evidence under the plea of *plene administravit*, 1 Brownl. 75; 6 Burr. 1380, 1385; 2 Bl. Rep. 965; Co. Lit. 283 a. It was in general advisable to plead it, in order to compel the plaintiff, by his replication, to admit either the retainer or the insufficiency of the assets; and as to what may be pleaded by way of retainer, see 1 B. & Ald. 664; 2 Stark. 528; see form of plea of retainer under marriage settlement, 4 Price, 89; how to frame plea in general, *id.*

BY AND AGAINST EXECUTORS, &c.

A.D. ——, by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, acknowledged himself to be held and firmly bound unto the defendant in the sum of £——, of lawful money of Great Britain, to be paid to the defendant, with a condition thereunder written, that if, &c. [*here set out the condition*] (*n*) which said writing obligatory was so made for securing the payment of a just debt (*o*), and at the time of the death of the said E. F. was, and still is, in full force and effect, not in the least reversed, satisfied, or otherwise vacated, and before and at the time of the commencement of this suit, a large sum, to wit, the sum of £——, payable to the defendant, under and by virtue of the said writing obligatory, for principal and interest, was and still is unpaid and unsatisfied to the defendant (*p*). And the defendant further saith, that the said E. F. in his lifetime, and at the time of his death, was justly and truly indebted to the defendant in a large sum of money, to wit, the sum of £——, for &c. [*here state the particulars of the set-off on simple contract as ante*, 115], and which said last-mentioned sum of money still remains wholly in arrear, unpaid and unsatisfied to the defendant. And the defendant further saith, that the said E. F. in his lifetime, to wit, on &c. [*date of will or about it*] duly made and published his last will and testament (*q*) in writing, and thereby constituted and appointed the defendant executor thereof, and afterwards, to wit, on the day and year last aforesaid, the said E. F. died without revoking or altering his said will; after whose death the defendant duly proved the said will, and took upon himself the burthen of the execution thereof; and the defendant further saith, that he hath fully administered all and singular the goods and chattels which were of the said E. F. at the time of his death, and which have ever come to the hands of the defendant as executor [*or* "administrator"] as aforesaid to be administered, except goods and chattels of small value, to wit, of the value of £10 (*r*), and that he hath not, nor at the time of the commencement of this suit, or at any time afterwards, had any goods or chattels which were of the said E. F. deceased, at the time of his death, except the said last-mentioned goods and chattels of the value aforesaid, which are not sufficient to pay or satisfy the monies due and owing to the defendant as aforesaid, and which he the defendant retains in his hands towards and in part satisfaction and payment thereof. And this the defendant is ready to verify, &c.

For a debt due to him on a bond.

And for a simple contract debt.

Defendant appointed executor, &c.

(*n*) When it is proper to state the condition of the bond in the plea, see 1 Saund. 333, n. 7; 5 T. R. 309.

(*o*) In pleading a retainer on a bond debt it is not necessary to aver that the bond was given for a just and true debt; 6 T. R. 550; 1 Saund. 330, n. 4, 333, n. 6.

(*p*) It seems proper in all cases to show how much is due on the bond; 3 T. R. 309; 1 Saund. 333, n. 7.

(*q*) In an action against an *administrator*, it is not necessary in his plea of retainer to state the letters of administration, because the declaration admits it; 6 T. R. 550; but it is otherwise in the case of an *executor*, who pleads a retainer in that character; 1 Mod. 208. But see 6 T. R. 550; 2 Stra. 1106; and therefore the above allegation of the will and appointment of the defendant as executor is in general advisable, and if in an action against a person sued as executor, he plead a retainer as administrator, the letters of administration should be stated; Sir T. Jones, 23; 6 T. R. 551.

(*r*) Some value ought to be stated, though the precise amount is not material or traversable; 1 Saund. 333, n. 7.

The like plea of retainer in another form.

And for a further plea in this behalf the defendant says, that the said E. F. in his lifetime, to wit, on the —— day of ——, in the year ——, and at the time of his death was justly and truly indebted to the defendant, to wit, in the sum of £——, for [*here state the particulars of the claim*], and which said sum of money still remains wholly in arrear and unsatisfied to the defendant; and the defendant further says, that the said E. F. in his lifetime, to wit, on &c. duly made and published his last will and testament in writing, and thereby constituted and appointed the defendant executor thereof, and afterwards, to wit, on &c. the said E. F. died without revoking or altering his will, after whose death the defendant duly proved the said will and took upon himself the burthen of the execution thereof: and the defendant further says, that he has fully administered all and singular the goods and chattels which were of the said E. F. at the time of his death, and which have ever come to the hands of him, the defendant, to be administered, except goods and chattels of small value, to wit, of the value of £——, and that he has not, nor at the commencement of this suit, or at any time afterwards, had any goods or chattels which were of the said E. F. deceased, at the time of his death, except the said goods and chattels of the value aforesaid, which are not sufficient to pay or satisfy the said monies due and owing to the defendant as aforesaid, and which he, the defendant, retains in his hands towards and in part satisfaction and payment thereof. And this the defendant is ready to verify, &c.

Judgment recovered against testator, an outstanding bond, and a judgment against defendant as executor. (*s*)

Judgment against deceased.

Bond outstanding.

The defendant, by Y. Z. his attorney, saith, that one G. H. heretofore, and in the lifetime of the said E. F. to wit, on &c. (*t*) in the Court of our said lady the queen, before the queen herself, [*state the recovery of the judgment against the deceased in the Queen's Bench, Common Pleas, or Exchequer, whether in assumpsit or debt, &c. precisely as in the precedents, ante, vol. ii. 338, and conclude as in those precedents with a reference to the record, and an allegation that the judgment is still in force; see the precedent,* 1 *Saund.* 329, *and then proceed as follows:*] And the defendant further saith, that the said E. F. in his lifetime, to wit, on &c. [*date of bond*], by his certain writing obligatory, sealed with his seal, became held and firmly bound to one J. K. in the sum of £—— of lawful money of Great Britain, to be paid to the said J. K., which said writing obligatory was so made as aforesaid for securing the payment of a just debt (*u*), and at the time of the death of the said E. F. was and still is in full force and effect, not cancelled, annulled, paid off, or satisfied; and before and at the time of the commencement of this suit there was and still (*x*) is due and owing to the said J. K. upon and by virtue of the said writing obligatory, a large sum of money, to wit, the

(*s*) See precedents, 3 Wentw. Ind. xxvi. to xxxiii.; 1 Saund. 329 to 339; Lutw. 446, 447; Lil. Ent. 57, 100, 111, 117, 119, 159; 2 Rich. C. P. 96 to 117; Plead. Assist. 370. And as to the form of a plea of this nature in general, see 1 Saund. 329 to 339, in the notes. An unsatisfied decree in equity cannot be pleaded, but that Court will relieve; 11 Vin. Abr. 291; Freem. 333; 3 P. Wms. 401, n. (*f*); Toller, 270; and see the plea of judgment recovered, *ante*, 107, and notes.

(*t*) The plea must state the time when and the Court in which the judgment was obtained, 1 Saund. 329, n. 1; and as to the mode of stating a judgment recovered against the deceased, *id. ibid.* n. 2. An erroneous judgment is sufficient; 1 Stra. 407.

(*u*) This allegation is usual, though it is not necessary. If the debt were not a just one, the plaintiff should show that fact in his replication; 1 Saund. 330, n. 4; 333, n. 6; 1 M. & S. 345.

(*x*) See Toller, 281; 11 Vin. Abr. 304.

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sum of £—— (*y*). And the defendant further saith, that one L. M. after the death of the said E. F., to wit, on &c. (*a*) impleaded the defendant as executor of the last will and testament of the said E. F. deceased, [*or* "as administrator of all and singular the goods and chattels, rights and credits, which were of the said E. F. at the time of his death, who died intestate,"] in the Court of our said lady the queen, before the queen herself, [*or*, "of the bench,"] at Westminster, in the county of Middlesex, in an action of debt (*b*), for the sum of £—— due and owing to the said L. M. from the said E. F. in his lifetime, and at the time of his decease; and such proceedings were thereupon had in the said Court of our said lady the queen, at Westminster aforesaid, in that plea, that the said L. M. afterwards, to wit, on &c. by the consideration and judgment of the said Court, recovered against the defendant as executor, [*or*, "administrator,"] as aforesaid, his said debt of ——, and also £——, which by the same Court were adjudged to the said L. M. for his damages which he had sustained, as well on occasion of the detaining of that debt as for his costs and charges by him about his suit in that behalf expended, to be levied of the goods and chattels which were of the said E. F. at the time of his death in the hands of the defendant to be administered, if he had so much thereof in his hands to be administered, and if he had not so much thereof in his hands to be administered, then the sum of £——, parcel of the damages aforesaid, being the amount of the costs and charges aforesaid, to be levied of the proper goods and chattels of the defendant. Whereof the defendant was convicted, as by the record and proceedings thereof, remaining in the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid, more fully appears. Which said judgment so had and obtained as aforesaid was had and obtained for a true and just debt due and owing to the said L. M. from the said E. F. in his lifetime, and at the time of his death, (*c*) and still remains in full force and effect, not in any-

Judgment against defendant. (*z*)

(*y*) The defendant may plead the penalty as the outstanding debt, or may show what is really due, and the latter mode is recommended; and sometimes it is proper to set forth the condition of the bond, as *ante*, 120; 5 T. R. 309; 1 Saund. 333, n. 7.

(*z*) As to the mode of pleading a judgment against the defendant as executor and administrator, see 1 Saund. 329, n. 3, 330, n. 4, 331, n. 5. Formerly it was the practice in all cases to set forth the bond or other debt, upon which the judgment was founded, and the pleadings in the action, 1 Saund. 329, n. 3. But the present mode of pleading in *assumpsit* a judgment obtained against an executor or administrator is as above, not stating the nature of the debt or the proceedings; and though it is stated in 1 Saund. 331, n. 5, to be proper to set forth the declaration or pleadings in the action, this is not usual; but in a plea to an action of debt on *specialty*, it is still necessary to show that the debt on which the judgment was recovered was a specialty, or to aver that the judgment was recovered before the defendant had notice of the plaintiff's demand, see 1 T. R. 690; 5 T. R. 238; 1 Sid. 333; Williams, Executors, 1537, 3rd edit.; an executor de son tort may after action brought by a simple contract creditor pay a specialty debt, and plead the payment of that debt in bar of the action; see *Oxenham* v. *Clapp*, 2 Bar. & Adol. 309, where see pleadings. See a plea of judgment recovered against defendant as executor *puis darrein continuance*, *post*. The Reg. Gen. Hil. T. 4 W. 4, requiring that a plea of judgment recovered in another Court should state the *date of the judgment*, and the number of the roll on which such proceedings are entered, does not extend to a plea by an executor or administrator of a judgment recovered against him in that character; *Power* v. *Isod*, 1 Bing. N. C. 304; 3 Dowl. 140; 3 Moore & Scott, 119, S. C.

(*a*) This is necessary, see *supra*, n. (*t*).

(*b*) The judgment is to be described according to the fact, whether in assumpsit, debt, or covenant; see the mode of stating the judgment, *ante*, 108. A plea of judgment recovered against the *defendant as executor or administrator* must, when pleaded to a declaration on a specialty, show that such judgment was obtained on a specialty, or record, or before the defendant had notice of the plaintiff's specialty claim; Williams on Executors, 1537, 3rd edit.

(*c*) This is not necessary, see *ante*, 133, n. (*u*).

wise reversed, annulled, discharged, or satisfied; (*d*) and before and at the time of the commencement of this suit, there was and still is due and owing to the said L. M. upon and by virtue of the said last-mentioned judgment, a large sum of money, to wit, the sum of £—— (*e*). And the defendant further saith, that he hath fully administered all and singular the goods and chattels which were of the said E. F. deceased, at the time of his death, which have ever come to his hands to be administered, except goods and chattels of small value, to wit, of the value of £10 (*f*), and that he, the defendant, hath not, nor at the time of the commencement of this suit, or at any time since, had any goods or chattels which were of the said E. F. at the time of his death in his hands to be administered, except the said goods and chattels of the value aforesaid, which are not sufficient to satisfy the said several debts so due and owing on the said judgment and writing obligatory [*according to the fact*], and which are subject and liable to satisfy the said several debts. And this the defendant is ready to verify, &c. (*g*)

Plene administravit præter.

See forms, *Price* v. *Nicholson*, 5 Taunt. 333, 664; 1 Marsh. 70, 280, S. C.; *Lyttleton* v. *Cross*, 3 Bar. & Cres. 317; 5 Dow. & Ry. 175, S. C.

Judgment pleaded to an adverse creditor's action recovered against *an executor*, and payment thereof after the present action was commenced.

And the defendant, by Y. Z. his attorney, as to the first count of the said declaration, except as to the sum of £18, parcel of the said sum of £42 in that count mentioned, says, that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says that he has not, at any time since the death of the said R. L., had, received, or derived, nor could he have, receive, or derive any rent or profit whatever as administrator as aforesaid, or otherwise, by or from the said demised premises or any part thereof, except rents and profits to the amount of £18 and no more; and the defendant further says, that he has fully administered all and singular the goods and chattels which were of the said R. L. deceased, at the time of his death, and which have ever come to the hands of the defendant as administrator as aforesaid to be administered, except the said rents and profits to the amount of the said sum of £18, and that he hath not, nor at the time of the commencement of this suit, or at any time since, had any goods or chattels which were of the said R. L., deceased, at the time of his death in the hands of the defendant as administrator as aforesaid to be administered, except the said rents and profits to the amount of the said sum of £18. [*Semble, that there should be here introduced an averment that defendant offered to surrender, &c. see the cases in note* (*h*), *infra, and which may be as*

Plea to an action against an *administrator* for rent, that he has not received any rent or profits from the estate as administrator or otherwise, except £18, and plene administravit præter.(*h*)

(*d*) This is unnecessary, see 1 Saund. 330, n. 4.

(*e*) As to this allegation, see *ante*, 134, n. (*y*).

(*f*) As to this allegation, see *ante*, 132, n. (*r*).

(*g*) Formerly this plea was concluded with an averment of the intestate's being the same person as mentioned in the bond and record of judgment, but it is not material, and is now omitted; 1 Saund. 334, n. 8.

(*h*) As to this plea see 1 Chitty Gen. Prac. 539, 540; and *post*, pleas in debt and in covenant; and *Rubens* v. *Stevens*, 4 Bar. & Adol. 241; an averment in the plea that the premises were of less value and had yielded less profit than the arrears of rent, to wit, £——, is not supported by proof that the intestate had underlet them, and that the defendant was unable to get the rent from the undertenant; or by proof that they were out of repair, where the lease to the intestate contained a covenant to repair, and it was therefore the defendant's duty to repair them; *Hornidge* v. *Wilson*, 3 P. & D. 641; 11 A. & E. 645, S. C. And where an administrator has occupied premises demised to the intestate, it is no plea to an action on a covenant

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follows: "And the defendant further saith, that before the rent became due the said defendant offered and tendered to the said plaintiff to surrender and give up all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim and demand of him the defendant as administrator as aforesaid, or otherwise, which the plaintiff refused to accept."] And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action against him, except as to the sum of £18, parcel &c. And as to the said sum of £18 parcel &c. as aforesaid, the defendant says, that the plaintiff ought not *further* to maintain his action against the defendant, because the defendant now brings into Court the sum of £18 ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages [*or, in action of debt,* "that he never was indebted to the plaintiff"] to a greater amount than the said sum of £18, in respect of the cause of action in the first count of the declaration mentioned, as to the said sum of £18 parcel &c. as aforesaid. And this he is ready to verify, wherefore he prays judgment if the plaintiff ought further to maintain his action thereof.

Payment into Court of the sum admitted.

To an action against executor for breach of an agreement for a lease, plea of forfeiture by the testator and re-entry by the plaintiff before breach. (*i*)

And for a further plea in this behalf, as far as relates to the nonpayment of the money rents, the defendant says, that before any breach of promise in regard to the payment of such money rents, and before the amount mentioned to be due and in arrear in respect of such rents did or could become due, the said C. F. broke his agreement in this [that he did not at his own costs erect or build on the said piece of ground four second-rate messuages on or before the 25th day of December, 18—, nor four more before the 25th day of December, 18—, and committed all the breaches of agreement mentioned, to which the pleas are not pleaded,] whereby the said C. F. forfeited all right and interest in the said piece of ground, and the plaintiff became entitled to re-enter on the same. And the defendant further says, that before any such default or breach of promise as in the declaration mentioned and alleged to have been committed in respect of the said money rents, and before the amount in the declaration mentioned to be due and in arrear in respect thereof could or did become due, the plaintiff re-entered upon all the said premises, and had again all the estate and interest of the said C. F. and of the said defendant as his executor, whereupon their interest ceased and was determined. And this the defendant is ready to verify, &c.

Plea to action by executors against two defendants where the probate was taken out in the province of Canterbury instead of York.

And the defendants, by ——, their attorney, —— crave oyer of the said supposed letters testamentary, and they are read to them in these words: This is the last will or [*here set out the whole probate verbatim,*] which being read and heard, the defendants say, that at the time of the death of the said Y. Z. the defendant —— was inhabitant of ——, in the parish of ——, in the county of ——, within the diocese of the Bishop of ——, within the *province of York* and not within the *province of Canterbury*, and also that at the time of the death of the said Y. Z. the defendant —— was an inhabitant of and resident in the city of ——, in the county of Chester, and within the

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to pay rent and taxes, and for non-repair, to say that the premises yield no profit, for the administrator is bound to repair in the same manner as any other assignee; *Tremeere* v. *Morison*, 1 Bing. N. C. 89.

(*i*) See declaration and plea, *Oldershaw* v. *Holt*, 4 P. & D. 307.

diocese of the Bishop of ——, within the province of York, and not within the province of Canterbury; and the defendants further say, that the said debts in the said declaration mentioned, and the said causes of action had accrued against the defendants at the time of the death of the said Y. Z., and that the same then amounted and still do amount to and were and are of the value of £—— and upwards, by reason whereof the said letters testamentary are void and of none effect in law, so as to enable the plaintiffs to maintain their aforesaid action as to the said debts and causes of action in the said declaration mentioned. And this the defendants are ready to verify, &c.

Plea to action on a banker's cheque that the defendant was executor of R. S., that the plaintiff received the cheque subject to a condition that the legatees under the will should authorise the plaintiff to receive the amount, and that the legatees had not so authorised the plaintiff. (*k*)

And the defendant, by ——, his attorney, says, that before the making of the draft or order in the declaration mentioned, to wit, on the —— day of ——, 18—, one R. S., since deceased, in his lifetime was lawfully possessed of certain estate and effects of great value, to wit, of &c., including a certain bond or obligation thereinafter mentioned, and being so possessed thereof, the said R. S. afterwards, to wit, on the day and year aforesaid, made and published his last will and testament in writing, and thereby gave, devised and bequeathed his said estate and effects, the same being the rest, residue and remainder of the estate and effects of the said R. S., after satisfying a certain devise in the said will mentioned, unto and amongst his the said R. S.'s twelve grandchildren, and to the children of his granddaughter M. C. deceased, such children to take their mother's share only, equally to be divided between them; and the said R. S. thereby constituted and appointed the defendant executor of his said will; and afterwards, to wit, on the —— day of ——, 18—, the said R. S. died without revoking or altering his said will; after whose death the defendant duly proved the said will, and took upon him the burthen of the execution thereof; and the defendant further says, that before and at the time of the making of the said draft or order in the declaration mentioned, the defendant as such executor as aforesaid was lawfully entitled to a certain bond or obligation, being part of the effects of the said R. S. in his lifetime, and then deceased, made for the payment to the said R. S. deceased, in his lifetime of the sum of £800, with interest, at a certain day in the said bond or obligation mentioned, and then elapsed, and which said bond or obligation was then in the hands and possession of the plaintiff, who refused to deliver up the same to the defendant as such executor as aforesaid, although the plaintiff well knew that he the defendant, as such executor as aforesaid, was lawfully entitled to the same, and the plaintiff and divers, to wit, twelve other persons, claimed to be entitled to legacies under and by virtue of the last will and testament of the said R. S. deceased, but the amount payable to the plaintiff and the said other legatees was then unascertained; and thereupon, just before the making of the said draft or order in the declaration mentioned, to wit, on the day and year therein mentioned, it was agreed by and between the plaintiff and the defendant, so being such executor as aforesaid, that the plaintiff should deliver up the said bond or obligation to the defendant as executor as aforesaid, and that the defendant should make and deliver to the plaintiff the draft or order in the declaration mentioned, and that the same should be a security

(*k*) See *Spincer* v. *Spincer*, 2 M. & G. 295.

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for the payment of the legacies mentioned in the said will, and that the plaintiff should receive the said sum of money in the said draft or order mentioned, upon and subject to a certain express condition then contained in a certain writing then signed by the plaintiff, that the legatees under the said last will and testament of the said R. S. deceased, should authorise the plaintiff to receive the said sum of £250; and the plaintiff then promised the defendant that the said legatees should and would authorise him to receive the said sum; and the defendant then made the draft or order in the declaration mentioned, and the plaintiff took and received the same upon and subject to the said condition, and upon the faith of the said promise, and on no other account. And the defendant avers that the said legatees under the said will had not, nor had any or either of them, ever authorised the plaintiff to receive the said sum of £250, or any part thereof, although a reasonable time for that purpose had elapsed before and at the time of the commencement of the suit, but had wholly neglected and refused and still do neglect and refuse so to do; and the defendant further says that there never was any consideration for the making of the said draft or order in the declaration mentioned, save and except as in this plea mentioned. And this the defendant is ready to verify, &c.

2. In Actions by Assignees of a Bankrupt, &c.

Observations.

Observations.]—In actions by assignees of a bankrupt, if their derivative title is to be disputed, the character in which they sue must be specially denied. See Reg. Gen. Hil. T. 4 Will. 4, reg. 21. The Bankrupt Act, 6 Geo. 4, c. 16, s. 90, requires the defendant, at or before the time of his pleading, to give notice in writing to the assignees of his intention to dispute some and which of such matter; and see *Trimley* v. *Uwins*, 6 Bar. & Cres. 537; 9 D. & Ry. 548, S. C.; see form of notice *infra*. Where to an action by the assignees of a bankrupt for breach of a contract made by the defendant with the bankrupt to sell goods to the latter, the defendant pleaded that the plaintiffs did not within a reasonable time after the bankruptcy give notice to the defendant of their intention to adopt the contract for the purchase of the goods, and to abide by the terms thereof, it was held by the Court of Exchequer, Lord Abinger, C. B., *dissentiente*, that the plea was bad; *Gibson* v. *Carruthers*, 8 M. & W. 321.

Denial that plaintiffs are assignees. (*l*)

C. D. ats. A. B. and another. suing as assignees, &c.

And for a further plea in this behalf the defendant saith, that the plaintiffs were not nor are they assignees of the estate and effects of the said E. F., a bankrupt, in manner and form as the plaintiffs have above in the said declaration alleged. And of this the defendant puts himself upon the country, &c.

(*l*) This plea puts in issue the petitioning creditor's debt, and the act of bankruptcy; *Butler* v. *Hobson*, 4 Bing. N. C. 290; 6 Dowl. 409, S. C.; *Buckton* v. *Frost*, 1 P. & D. 102.

By Assignees of a Bankrupt, &c.

Plea to assumpsit by assignees of an alleged bankrupt, denial that the party was a trader liable to the bankrupt laws. (m)

And for a further plea in this behalf the defendant saith, that the said A. B. was not before or at the time of the issuing of the fiat in bankruptcy, whereupon the plaintiffs claim to be assignees as aforesaid, and which issued on a certain day, to wit, on &c. *a trader* liable or subject to become a bankrupt according to or within the meaning of the statute concerning bankrupts. And this the defendant is ready to verify, &c.

Plea of set-off in actions by assignees.

And for a further plea in this behalf the defendant says, that the said E. F., before and at the time of his bankruptcy, was indebted to the defendant in a large sum of money, to wit, £—— for goods sold by the defendant to the said E. F. at his request, and in [*as usual, see ante*, 116, &c. "Set-off,"] and the said sum wherein the said E. F. was so indebted, before and at the time of the commencement of this suit, was and is yet due and owing to the defendant, and exceeds the damages sustained by the plaintiffs as assignees as aforesaid, by reason of the non-performance by the defendant of the promises in the declaration mentioned, and out of which sum so due to the defendant, he is ready and willing and hereby offers to set off and allow to the plaintiffs as assignees as aforesaid the full amount of the said damages. And this the defendant is ready to verify, &c.

Plea that before action bankrupt assigned the claim to a third person.

See form, *Leslie* v. *Guthrie*, 1 Hodg. 82; 1 Bing. N. C. 697, S. C.; *Gibson* v. *Bell*, *id.* 748,

Notice of intention to dispute (n) the trading, or the petitioning creditor's debt, or the act of bankruptcy.

In the ——

A. B. and G. H. suing as assignees of E. F. an alleged bankrupt ..... Plaintiffs;

and

C. D..... .....Defendant.

Take notice that the above-named defendant intends on the trial of this cause to dispute and will then dispute the *trading, petitioning creditor's debt, and act of bankruptcy* [*or if the whole be not disputed, then limit the notice accordingly,*] of E. F. above-named, on which the fiat in bankruptcy lately awarded and issued against the said E. F., and under which the plaintiffs claim to be assignees, is supposed to be founded. Dated, &c.

——, defendant's attorney [*or* "agent."]

To A. B. and G. H., the above-named plaintiffs, and to ——, their attorney [*or* "agent."]

(m) *Quære*, whether the trading is not put in issue by the last plea.

(n) See 6 Geo. 4, c. 16, s. 90. The notice must not be to dispute the *bankruptcy* generally, but must specify what *facts* in particular will be disputed, as the petitioning creditor's debt, the trading, act of bankruptcy, &c.; *Trimley* v. *Uwins*, 6 Bar. & Cres. 537; 9 Dowl. & R. 548, S. C. A defendant who gives notice to dispute the act of bankruptcy only must, in the absence of proof of any other act of bankruptcy, be taken to have admitted a trading and a petitioning creditor's debt co-existent with the act of bankruptcy proved; *Porter* v. *Walker*, 1 M. & G. 686. The section applies to actions of ejectment by an assignee; *Doe* d. *Johnson* v. *Liversedge*, 11 M. & W. 517.

By Assignees of a Bankrupt, &c.

Plea in assumpsit by the assignee of an insolvent debtor, denial that plaintiff is such assignee.

The defendant, by Y. Z. his attorney, saith, that the plaintiff was not nor is assignee of the said A. B. as such insolvent debtor, according to the said act. And of this the defendant puts himself upon the country, &c.

Pleas of set-off in actions by assignees.

See *ante*, 116, 117.

Plea to action by assignees of insolvent for money due to the insolvent, that the insolvent before his insolvency assigned his debts, &c. to W., in trust for his creditors, and that the defendant had paid the debt to W. and that the insolvent had not executed the indenture with intent to petition. (*n*)

And for a further plea in this behalf as to £——, parcel &c., the defendant says, that before the said A. B. [*the insolvent*] petitioned the Court for the Relief of Insolvent Debtors as in the declaration mentioned, and three months and more before the commencement of his imprisonment, to wit, on the —— day of ——, A. D. ——, by indenture then made and of that date, by the said A. B. of the first part, one S. W. of the second part, and all others the creditors of the said A. B. who should execute that indenture of the third part, he the said A. B. bargained and sold, assigned, transferred and set over to the said S. W. all and singular his household goods and furniture, stock in trade, chattels, book debts and effects, in trust for the said S. W. and such creditors of the said A. B. as should sign the indenture, and thereby made the said S. W. his attorney to ask, demand, sue for, recover and receive the said stock, debts, &c. And the defendant avers that the said indenture was not made within three months before the imprisonment of the said A. B. commenced, nor with the view or intention that the said A. B. should petition the Court for the Relief of Insolvent Debtors for his discharge from custody. And the defendant further says, that before and at the time of making the said indenture, the defendant was indebted to the said A. B. in the sum of £——, parcel &c., and no more; and that he the defendant was required by the said S. W., after the making the said indenture and before the commencement of this suit, to wit, on &c., to pay the said sum of £—— to him the said S. W.; and that thereupon, to wit, on the day and year last aforesaid, he the said defendant paid the said sum to the said S. W. who accepted and received the same in full satisfaction and discharge thereof, for the purposes in the said indenture mentioned. And this the defendant is ready to verify, &c.

(*n*) See *Peacock* v. *Harris*, 5 A. & E. 449.

IV. PLEAS TO DECLARATIONS ON BILLS AND NOTES.

1. Rules, Decisions and Observations.

Rules, &c.

The Reg. Gen. Hil. T. 4 Will. 4, prohibits the use of the plea of *non assumpsit to a declaration on a bill of exchange or promisory note* in any case; and requires a *particular denial* of one or more of the allegations in the declaration, or a *special plea* as in the following forms; and if to a declaration containing a count on a bill or note as well as *indebitatus* counts, non assumpsit should be irregularly pleaded to the whole declaration, the plaintiff may sign judgment as to the count on the bill or note and enter a nolle prosequi to the money counts, if they are founded on the same cause of action as the bill or note; *Frazer* v. *Newton*, 8 Dowl. 773. See also *Donaldson* v. Thompson, 6 M. & W. 316; 8 Dowl. 209, S. C. Where however, in an action by an executor on a promissory note, the declaration alleged a promise to the plaintiff after the death of his testator, a plea of non assumpsit was held to be correct; *Timmis* v. *Platt*, 2 M. & W. 720; 5 Dowl. 748, S. C.

The above rule, Hil. T. 4 Will. 4, also orders that, "Drawing, indorsing, or accepting bills or notes *by way of accommodation* must be pleaded specially." It is clear therefore that the *want of consideration* for drawing, accepting or indorsing, &c. must be pleaded specially. *Passenger* v. *Brooks*, 7 Car. & P. 110; 1 Bing. N. C. 587; 1 Scott, 560, S. C.

In an action on a bill or note it is a *legal presumption* that the *drawing*, *accepting* and *indorsing* were respectively founded on a *sufficient* consideration, and that each party as well acceptor as indorser has received an adequate consideration for his acceptance or indorsement; and if the defendant insist that the plaintiff holds the instrument without consideration, and under circumstances which preclude him from enforcing payment, he *must plead* such objection *specially;* and if the plaintiff sue as a remote indorsee, as it is a legal presumption that he or some antecedent party from whom he derives title has given full value, the defendant must show all the facts specially to negative the presumption in plaintiff's favour. The plea must, therefore, not merely allege that the defendant became a party without consideration, or that the plaintiff gave no consideration, but also state why or for what purpose the defendant accepted the bill or made the note, as that he accepted or made it "*for the accommodation of the plaintiff, and without any value or consideration past, present or prospective for so doing*," or on the plaintiff's promise to provide money for or pay the same, or to indemnify and save him harmless against the consequence of his so accepting, or on the promise of a prior party to indemnify him, and then to aver that the plaintiff gave no value, &c. Therefore in an action by the payee against the maker of a note, a plea that the defendant made the note without any value or consideration for so doing, or for his paying the amount, is bad; for a plea of this nature even between the original parties must not be thus

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general, but must contain *affirmative* matter of defence, so that the pleadings may show on whom is the burden of affirmative proof, *Stoughton* v. *Earl Kilmory*, 1 Gale, 91; 3 Dowl. 705; *Lacey* v. *Forrester*, 3 Dowl. 668; and a plea that defendant indorsed the bill to the plaintiff "without having or receiving any value or consideration whatever for or in respect of the said indorsement" is bad on special demurrer, though aided by a verdict for the defendant. Per Lord Abinger, "The special matter which is now to be pleaded in actions on bills of exchange is not merely to be like the notice that used to be given of an intention to dispute the consideration, but it is intended to inform the plaintiff of the real nature of the defence, such as that the bill was accepted for the accommodation of another named person, or for a consideration that afterwards failed, or that the bill was given for a gambling transaction, or the like, each of which defences the *defendant* must now *plead specially* and *prove*." (*o*) Where in an action against two defendants as acceptors of a bill of exchange drawn on them by the plaintiff, one of the defendants, C., pleaded that he was in partnership with his co-defendant, who had accepted the bill in fraud of the partnership, and that he, C., had received no consideration, of all which the plaintiff at the times of drawing and accepting had notice; it was held, that as the plea alleged notice to the plaintiff at the very time when the bill was accepted that the implied authority of his co-partner to bind C. by the acceptance did not exist as to the particular bill, that the plea contained no confession of the acceptance in fact, and was therefore bad, as an argumentative traverse of the acceptance by C. alleged in the declaration; *Jones* v. *Corbett*, 2 G. & D. 308. And it has been more recently decided that one partner of a firm of attornies has no authority to make a promissory note in the name of the firm, though for money delivered to him in the course of business, *Hedley* v. *Bainbridge*, 2 G. & D. 483; but notwithstanding a dissolution of partnership, one partner has an authority to indorse in the name of the partnership bills drawn by the firm and accepted before the dissolution, and the partnership will be liable to a bonâ fide indorsee on such an indorsement, though he had then notice of the dissolution, and a plea of such facts must therefore show the plaintiff to have been so connected with some fraud as to have vitiated the indorsement to him; *Lewis* v. *Reilly*, 4 P. & D. 629. Where part of a debt, the consideration of a bill, is incurred before and part after the commencement of a partnership, the plaintiff is entitled to a verdict against all the members of the partnership for the amount of debt incurred subsequently to the commencement of the partnership; *Wilson* v. *Bailey*, 9 Dowl. 18.

A plea that the bill was accepted *for the accommodation* of the *plaintiff* is valid; *Thompson* v. *Clubley*, 3 Crom. M. & Ros. 212. But a plea to a declaration by an *indorsee* against acceptor, that defendant accepted without any consideration passing to him from drawer for his acceptance is bad, *Low* v. *Chiffney*, 1 Bing. N. C. 267; 1 Scott, 95; *Bramah* v. *Roberts*, 1 Scott, 350; 1 Bing. N. C. 409, 469; but aided by verdict. A plea of defect in consideration should state the facts and circumstances affirmatively, and should in the terms of the rule be that the defendant accepted &c. *for the accommodation* of a named person, 2 Cr. M. & Ros. 59, 60; 1 Mood. &

(*o*) *Easton* v. *Pratchett*, 6 Car. & P. 736; 1 Gale, 30; 3 Dowl. 472, S. C.; 4 Dowl. 549.

Rob. 379; 1 Gale, 39, 59; 3 Dowl. 472; plea no consideration for *payment* is too general, 1 Gale, 59; *Graham* v. *Pitman*, 5 M. & Scott, 37; *Trinder* v. *Smedley*, *id.* 138; 3 Dowl. 453; *Easton* v. *Pratchett*, 1 Cr. M. & Ros. 798; *Lacey* v. *Forrester*, 2 Cr. M. & Ros. 59, 60; *Stoughton* v. *Earl Kilmorey*, *id.* 72. And where to an action by a second indorsee of a note against the maker, the defendant pleaded that he had no consideration for making or paying the note, and the plaintiff replied that the note was indorsed to her in part payment of a debt due to her from payee, and that she had no notice of the premises at the time of the indorsement to her; and the defendant rejoined that she had notice; on demurrer it was held, that such rejoinder was bad for taking an *immaterial* traverse; *Pearce* v. *Champneys*, 3 Dowl. 276.

So a plea to a declaration on a bill by *indorsee* against acceptor, merely stating that it was accepted for the accommodation of the payee without any consideration, and that it was indorsed to plaintiff after it was due, is bad; *Sturtevant* v. *Ford*, 4 M. & Gr. 101; *Stein* v. *Yglesias*, 3 Dowl. 252; 1 Gale, 98, S. C. Where a frivolous plea of want of consideration in action by indorsee against the drawer is pleaded, the Court will set aside the plea and give the plaintiff leave to sign judgment, see *Emanuel* v. *Randall*, 3 Dowl. 238.

Plea by some of several defendants sued as acceptors, that the bill was accepted without consideration and for special purposes, and was fraudulently indorsed to the plaintiff, he having notice of the premises, was holden good, but a similar plea not averring notice was bad; *Bramah* v. *Roberts and others*, 1 Bing. N. C. 469.

So in an action on a bill of exchange by an indorsee against his immediate indorser, a plea that for the indorsement the defendant neither had nor received any value or consideration is *good after verdict*, but it would be bad on *special demurrer*; *Easton* v. *Pratchett*, 1 Gale, 80; 1 Crom. M. & Ros. 798; 3 Dowl. 472; 6 Car. & P. 736.

So in an action on a check on a banker by payee against drawer, a general plea of no consideration is aided after verdict. To such a general plea the replication may be, that there was a good, valid and sufficient consideration, and conclude to the country; *Mills* v. *Oddy*, 6 Car. & P. 722, 728; 1 Gale 92; 2 Crom. M. & Ros. 103.

An indorser defendant cannot plead that the action was commenced against him before the expiration of a reasonable time after notice of dishonour; *Siggers* v. *Lewis*, 1 Crom. M. & Ros. 370.

To a plea by the acceptor of a bill, that it was to the knowledge of the plaintiff negotiated by fraud, and that no consideration was given for the indorsement to the holder, it is sufficient to reply generally that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration; also suggestions how to reply in general; *Bramah* v. *Roberts and others*, 1 Bing. N. C. 469; 3 Dowl. 393, S. C.

Plea to action by indorsee of a bill, that the indorser was a married woman, and replication that she indorsed by authority of her husband; 1 Bing. N. C. 435; 3 Dowl. 382.

The maker of a promissory note sued by an indorsee, may plead that the indorsee was a lunatic at the time of the indorsement, and that there was no consideration for such indorsement; *Alcock* v. *Alcock*, 3 M. & G. 268. A promissory note, payable on demand, cannot be treated as overdue, so as to

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affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest has been paid on it for several years before such indorsement; *Brooks* v. *Mitchell*, 9 M. & W. 15.

Where a promissory note is payable by instalments, subject to a condition that on default being made in payment of the first instalment the whole amount shall become immediately payable, the note is assignable within the statute 3 & 4 Anne, c. 9, and on default being made by the maker in payment of the first instalment, the indorser is liable for the whole amount; *Caslon* v. *Kenealy*, 12 M. & W. 139.

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2. PRECEDENTS.

Plea denying the making of a note, or drawnig, indorsing, or accepting a bill of exchange or note as alleged in declaration. (*p*)

The defendant, by Y. Z., his attorney, saith that he did not make [*or* "draw, *or* "indorse," *or* "accept,"] the said bill of exchange [*or* "promissory note,"] in the said declaration [*or* "first count"] mentioned, in manner and form as the plaintiff hath above in that behalf alleged. And of this the defendant puts himself upon the country, &c.

Plea denying indorsement by defendant or a third person.

The defendant, by ——, his attorney, as to the first count of the said declaration, saith, that he [*or* "that the said Y. Z."] did not indorse the said bill of exchange therein mentioned to the plaintiff [*or* "to the said

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(*p*) The plea must describe the instrument *as in the declaration*, and not in the alternative; see 1 Harr. & Wol. 426. See a plea that drawer did not indorse, *Gilmore* v. *Hague*, 4 Dowl. 303. If the plea be by one of several joint defendants, it should be that he and his co-defendants did not make &c. the note &c.; *Robertson* v. *Steward*, 1 M. & G. 512, n. (*a*) The acceptor of a bill cannot in an action against him by an indorsee dispute the handwriting of the drawer, and if he do so by plea the plaintiff may reply the acceptance by way of estoppel; *Sanderson* v. *Collman*, 4 M. & G. 209. Where a bill is accepted and negociated by the acceptor, with knowledge that the drawing and indorsement by the alleged drawer were forgeries, he is estopped to deny the indorsement by the alleged drawer as well as the drawing; but it seems that where the name of a real party as the drawer is forged, a party who accepts the bill in ignorance of the forgery is estopped to deny the drawing only, but not the indorsement, although in the same handwriting; *Beeman* v. *Duck*, 11 M. & W. 251.

An alteration in a bill of exchange or other instrument may be taken advantage of under one of these pleas where its effect is to make a new stamp necessary, *Calvert* v. *Baker*, 4 M. & W. 417; 7 Dowl. 17, S. C.; *Cook* v. *Coxwell*, 2 C. M. & R. 291; and on a plea denying the drawing, making or accepting, the plaintiff must explain any alteration in the date appearing on the face of the bill or note, or he will be nonsuited; *Knight* v. *Clements*, 8 A. & E. 215; 3 N. & P. 375, S. C.; and see observations of Parke, B. in *Earl of Falmouth* v. *Roberts*, 9 M. & W. 471.

A plea denying the indorsement of a bill of exchange puts in issue not only the fact of the signature, but also a delivery with intent to transfer the bill; *Marston* v. *Allen*, 8 M. & W. 494; 1 Dowl. N. S. 442, S. C.

The plaintiff is also bound under these traverses to show an instrument properly stamped; *Field* v. *Woods*, 7 A. & E. 114; 2 N. & P. 117, S. C.; *Dawson* v. *Macdonald*, 2 M. & W. 26; *M'Dowall* v. *Lyster*, *id.* 52. And a plea that a bill was not duly stamped is ill; *Howard* v. *Smith*, 4 Bing. N. C. 684. But where the alteration is not such as to cause a variance between the statement in the declaration and the instrument when produced, or to raise an objection to the stamp on the document, a special plea is requisite, and the case of *Calvert* v. *Baker* and other cases cited above must be taken with this qualification, as they are only applicable where the alteration is such as to put an end to existing liabilities, *Mason* v. *Bradley*, 11 M. & W. 590; *Davidson* v. *Cooper*, 11 M. & W. 778; 1 D. & L. 377, S. C.; and under a plea denying an indorsement, the making is admitted, and the plaintiff cannot be called on to show that an alteration in the date was made before the bill was negotiated; *Sibley* v. *Fisher*, 7 A. & E. 444.

A subsequent interlineation and alteration of a promissory note, bill of exchange, or other instrument as a guarantee, is properly the subject of a special plea, and cannot be taken advantage of without; *Hemming* v. *Trenery*, 9 A. & E. 926; 1 P. & D. 661, S. C.; *Davidson* v. *Cooper*, 11 M. & W. 778; 1 D. & L. 377, S. C.

—,"] as in that count alleged. And of this the defendant puts himself upon the country, &c.

Denial of due presentment of bill or note for payment. (q)

And for a further plea in this behalf the defendant says, that the said bill [*or* "note"] in the said declaration mentioned was not duly presented to the said Y. Z. for payment thereof when the same became due in manner and form as the plaintiff hath in his said declaration alleged. And of this the defendant puts himself upon the country, &c.

By indorser of bill or note that he had not due notice of dishonour. (r)

And for a further plea in this behalf, the defendant says, that he, the defendant, had not due notice of the non-payment of the said bill [*or* "note,"] in the (first) count of the declaration mentioned by the said E. F. in manner and form as the plaintiff hath in his said first count in that behalf alleged. And of this the defendant puts himself upon the country, &c.

Plea that the date of the bill was altered after acceptance without acceptor's knowledge. (s)

And for a further plea in this behalf to the said first count the defendant says, that the said bill of exchange at the time of the making of the same and at the time of the acceptance thereof by the defendant, bore date heretofore, to wit, on &c. And the defendant further saith, that after the said making and acceptance thereof, to wit, on &c. the plaintiff, without the consent of the defendant, altered and changed the said date of the said bill of exchange, to wit, by erasing and obliterating the said date of the —— day of ——, A. D. ——, and by inserting instead thereof the date of the said —— day of ——, A. D. ——. And this the defendant is ready to verify, &c.

Plea that the promissory note was made by the defendant and another, and that the plaintiff erased the name of one of the parties without the defendant's knowledge. (t)

And for a further plea in this behalf to the —— count of the declaration the defendant says, that the promissory note in that count mentioned was

(q) Sometimes the plea first states when the bill or note became due, but that allegation is not necessary, because the date of the instrument and the time when thereby made payable must sufficiently appear from setting it forth. A promise made by the defendant to pay the bill or note after it became due is *primâ facie* evidence to prove the issue; *Crowson* v. *Worthen*, 5 M. & W. 5; *Lundie* v. *Robertson*, 7 East, 231. See also *Buxton* v. *Jones*, 1 M. & G. 83.

(r) A notice of dishonour, given by the holder of a bill of exchange, need not inform the party addressed that the holder looks to him for payment, but it must inform him that the bill has been presented to the acceptor; *Furze* v. *Sharwood*, 2 Q. B. Rep. 388; 2 G. & D. 116, S. C. See also *Robson* v. *Curlewis*, 3 G. & D. 69; *Miers* v. *Brown*, 11 M. & W. 372. As to what is evidence, in the absence of the letter containing the notice, that it contained a regular notice of dishonour, see *Curlewis* v. *Corfield*, 1 G. & D. 489. If the declaration avers notice of dishonour, and the defendant denies it by his plea, and it appears that the defendant *dispensed* with notice, he will succeed on that plea, for the dispensation ought to be alleged in the declaration, *Leigh* v. *Legge*, 5 M. & W. 418; but a declaration by the defendant to a third party that he should pay the bill and not avail himself of the informality of notice, is evidence from which a jury may infer that the defendant had notice; *Brownell* v. *Bonney*, 1 Q. B. Rep. 39. See also *Messenger* v. *Southey*, 8 Dowl. 594. Where the plaintiff, by way of excuse for not having given notice of dishonour, averred that the defendant had no funds in the hands of the acceptor, nor had he sustained any damage by want of notice, it seems the defendant cannot plead that he had sustained damage because the acceptor had promised him to provide for the bill; or at least it is not incumbent on the plaintiff to prove that the defendant had sustained no damage; *Fitzgerald* v. *Williams*, 6 Bing. N. C. 68. Where a bill of exchange was indorsed to a branch of the National Provincial Bank of England at Portmadoc, who sent it to the Pwllheli branch of the same bank, who indorsed it to the head establishment in London, it was held that each of the branch banks was to be considered as an independent indorsee, and each entitled to the usual notice of dishonour; *Clode* v. *Bayley*, 12 M. & W. 51.

(s) See note (*p*) *ante*, p. 144, and the plea in *Atkinson* v. *Hawdon*, 4 Nev. & Man. 409; 1 Harr. & Woll. 77, S.C. It was there held, that although such a plea defeats *the remedy on the bill*, yet the drawer may sue the acceptor on the original debt or consideration.

(t) See *Nicholson* v. *Revill*, 4 A. & E. 675; and *Mason* v. *Bradley*, 11 M. & W. 590.

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a promissory note made by the defendant and one J. R., and by the defendant and the said J. R. delivered to the plaintiff, whereby they jointly and severally promised to pay, &c. [*describe the note*]. And the defendant further says, that after the making and delivery thereof and before the commencement of this suit, to wit, on the —— day of ——, A. D. ——, the plaintiff without the knowledge or consent of the defendant struck out and erased the name of J. R. on the said promissory note, and wholly discharged the said J. R. from all liability thereon and from payment of the sum therein mentioned or any part thereof. And this the defendant is ready to verify, &c.

Plea that the bill has been indorsed by the plaintiff and that he was not the holder at the commencement of the suit. (*u*)

And for a further plea in this behalf, as to the said first count of the declaration, the defendant saith, that after the said bill of exchange in that count mentioned was indorsed to the plaintiff, and before the commencement of this suit, to wit, on &c. he, the plaintiff, indorsed and delivered the said bill, the same being payable to order and transferable by indorsement, upon a good and sufficient consideration to one G. H., and the defendant then became and was and is liable to pay the said sum in the said bill specified to the said G. H., and who from the time of such indorsement until and at and after the time when this action was commenced, hath been and still is the holder of the said bill. And this the defendant is ready to verify, &c.

Plea to action on a promissory note, that the defendant had indorsed a bill for the accommodation of C. which was afterwards altered, and that the defendant in ignorance of the fact gave the promissory note to the plaintiff (the holder of the bill) for the amount. (*v*)

And for a further plea in this behalf [as to the —— count of the declaration] the defendant says, that before the making of the promissory note in the [—— count of the] declaration mentioned, to wit, on the —— day of ——, A. D. ——, one W. M. drew his bill of exchange directed to one S. T. and thereby requested the said S. T. three months after the date thereof to pay to the order of the said W. M. £——, and the said W. M. then delivered the said bill to the said S. T. and requested the said S. T. to accept the same for the accommodation of the said W. M., and thereupon the said S. T. then accepted the said bill of exchange for the accommodation of the said W. M., and then re-delivered the same so accepted to the said W. M., who then indorsed the said bill of exchange with his own name and then delivered the same to the defendant, and then requested the defendant to indorse the said bill of exchange for the accommodation of him the said W. M.; and the defendant then in compliance with such request indorsed the said bill of exchange for the accommodation of the said W. M., and then re-delivered the same to him; and the defendant says that he, the defendant, so indorsed the said bill of exchange for the accommodation of the said W. M., and without having received any consideration or value for such indorsement, and that the defendant has not since received any consideration or value for the same. And the defendant further says, that at the time he, the defendant, so indorsed the said bill of exchange, the same bore a certain date, to wit, the —— day of ——, A. D. ——, and that after the indorsement by the defendant, and after the said bill of exchange had been re-delivered by

(*u*) *Quære* the goodness of this form if specially demurred to. See *Fraser* v. *Welch*, 8 M. & W. 639; *Schild* v. *Kilpin*, *id.* 676.

(*v*) A negociable security given by a party in satisfaction of a liability from which he was discharged in law, in ignorance of the facts which constituted such discharge, cannot be enforced against him, though he may have had the *means* of knowing those facts; *Bell* v. *Gardiner*, 4 M. & G. 11. See also *Kelly* v. *Solari*, 9 M. & W. 54.

the defendant to the said W. M. as aforesaid, and before the same was paid and delivered to the plaintiff as hereinafter mentioned, to wit, on the day and year last aforesaid, the date of the said bill of exchange was altered to a certain other date, to wit, the —— day of ——, A. D. ——, and such alteration was made without the knowledge or consent of the defendant, and the defendant was and remained ignorant of such alteration having been made from thence until after the making by him the defendant of the promissory note in the said [—— count of the] declaration mentioned, and until after the delivery of the same to the plaintiff as in the said [—— count of the] declaration mentioned, to wit, until and upon the —— day of ——, A.D. ——. And the defendant further says, that after the making of the alteration in the date of the said bill of exchange as aforesaid, to wit, on the —— day of ——, in the year last aforesaid, the said bill of exchange with the date thereof so altered was paid and delivered to the plaintiff, who held the same from thence until afterwards, to wit, on the —— day of ——, in the year last aforesaid. And the defendant further says, that on the day and year last aforesaid the plaintiff applied to the defendant for payment to him of the amount of the bill of exchange; and thereupon the defendant, believing that the said bill of exchange was in the same state in which it had been when he the defendant so indorsed it as aforesaid, and being ignorant of the said alteration in the date thereof, and never having assented or agreed thereto, agreed with the plaintiff to make and deliver to him the said promissory note in consideration of the defendant's said supposed liability to the plaintiff upon the said bill of exchange, and for no other consideration whatever. And the defendant further says, that in pursuance of such agreement, he the defendant did make the said promissory note, and did deliver the same to the plaintiff as in the [—— count of the] declaration is mentioned in consideration of his supposed liability upon the said bill of exchange, and for no other consideration whatsoever. And so the defendant says, that he made the said promissory note and delivered the same to the plaintiff in the mistaken belief that he the defendant was liable to pay to the plaintiff the amount of the said bill of exchange; and that he the defendant never received any consideration or value for making the said promissory note, or for delivering the same to the plaintiff, or for the payment thereof. And this the defendant is ready to verify, &c.

See this form in *Heydon* v. *Thompson*, 1 Adol. & El. 210.

To an action by indorsee against acceptor, on a bill payable six months after date, plea that the defendant accepted in blank for the accommodation of the drawer, and that the latter was to draw the bill at nine months, and that the plaintiff took it with notice and without consideration. (*z*)

(*z*) Where B., by the authority of A., wrote the name of A. as acceptor upon a blank paper, bearing a bill stamp, and added his own name as drawer, and C., the plaintiff's indorsee, afterwards, but the same day, filled up the bill, and added the words, "payable at the Bank of England," under the name of A. without the knowledge of either A. or B.; and to a declaration by an indorsee against A. as acceptor (describing the acceptance as a general one), the defendant pleaded *non acceptavit*; it was held that the bill did not support the issue, and that no special plea was necessary, as the authority given by the defendant must be considered to have been to draw and accept *generally*, and as the drawing and accepting of the bill must be considered to have been to draw and accept *generally*, and therefore (as the drawing and accepting must be considered as taking place at the same time) the bill was never accepted in any other way than as payable at the Bank of England, and as the defendant had not sanctioned this, it could not be said that he accepted the bill which was produced at the trial; *Crotty* v. *Hodges*, 4 M. & G. 561.

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Plea in action by indorsee against acceptor, that the bill was accepted for the accommodation of the drawer, that it was negociated by the drawer for his own use and paid by him when it became due, and that afterwards it was reissued by him without a fresh stamp. (*y*)

And for a further plea in this behalf, [to the —— count of the declaration,] the defendant says, that he the defendant, for the accommodation and at the request of the said A. B. [*the drawer*], accepted the said bill of exchange in the [—— count of the] declaration mentioned, and that there never was any consideration or value whatever for the defendant's accepting the same, or paying the amount thereof, or any part of such amount. And the defendant says, that the said bill was and is an instrument or bill liable to the charges and duties imposed by the statute in such case made and provided. And the defendant further says, that the said bill, after the defendant had accepted the same as aforesaid, and before the same was indorsed to the plaintiff, to wit, on the —— day of ——, A.D. ——, was by the said A. B. indorsed and negociated for his own use and benefit; and the said A. B., when the said bill became and was due and payable, and before the same was indorsed to the plaintiff, to wit, on the —— day of ——, A.D. ——, fully paid and satisfied the said bill; and the said bill was thereupon then given up and delivered to the said A. B. fully paid, satisfied and discharged, and was thereupon wholly discharged, vacated and satisfied. And the defendant further says, that the said bill, after the same was so paid, satisfied and discharged and given up and re-delivered as aforesaid, and also after the same was due and payable, to wit, on the —— day of ——, A.D. ——, was without ever having been in any manner re-stamped and without the payment of any money or duty for or in respect of the re-issuing of the said bill, indorsed by the said A. B. to the plaintiff, and was thereupon delivered by the said A. B. to the plaintiff, contrary to the form of the statute in such case made and provided, of all which said several premises the plaintiff before and at the time when the bill was indorsed to him as aforesaid had notice. And this the defendant is ready to verify, &c.

Similar plea to action by indorsee against indorser on promissory note payable on demand. (*z*)

And for a further plea in this behalf [to the —— count of the declaration,] the defendant says, that at the time of the making of the promissory note in [the said —— count of] the declaration mentioned, the said I. H. [*the maker*] was indebted to one R. B. in the sum of £——, and the said R. B. then requested the said I. H. to furnish him with some security for the said debt; and thereupon the said I. H. requested the defendant to indorse for the said I. H. and for his accommodation a promissory note to be drawn by him, in order that he might deposit the same with the said R. B. by way of security for the said debt so due and owing by him to the said R. B. And the defendant consented to indorse such note; and thereupon the said I. H. made his promissory note in the declaration mentioned, and the defendant indorsed the same in blank and delivered it to the said I. H. for the purpose aforesaid and for no other intent or purpose whatsoever. And the defendant says, that the said I. H. did then deliver the said promissory note to the said R. B. by way of security for the said debt so due to him as aforesaid, and

(*y*) See form, *Lazarus* v. *Cowie*, 2 G. & D. 492. To bring the case within the Stamp Act, (55 Geo. 3, c. 184, s. 19,) the payment must be made in cash by the party liable at the maturity of the bill, according to the tenor of it, *Morley* v. *Culverwell*, 7 M. & W. 182; and the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value, and he is the person ultimately liable, and his payment discharges the bill altogether; *Lazarus* v. *Cowie*, 2 G. & D. 492.

(*z*) Where a note payable on demand has been indorsed for the accommodation of the maker in order to be deposited with his creditor to secure the debt due, if the maker of the note pays the debt, and the bill is re-delivered to him, it is no longer negociable; *Bartrum* v. *Caddy*, 1 P. & D. 207.

the said R. B. then had and received the same as such security as aforesaid. And the defendant further says, that afterwards, to wit, on the —— day of ——, A.D. ——, the said I. H. paid to the said R. B. the said debt so due to him from the said I. H. as aforesaid, and the said R. B. then redelivered the said promissory note to the said I. H. And the defendant further says, that the said I. H. afterwards, to wit, on the —— day of ——, A.D. ——, delivered the said note to the plaintiff without any authority from the defendant in that behalf. And this the defendant is ready to verify, &c.

To action by the fourth indorsee of a foreign bill against the first indorsee, alleging for breach nonpayment by the drawer, plea, that before the bill became due, and after the indorsement to the third indorsee, and before the indorsement to the plaintiff, the bill was refused acceptance and was protested; that the third indorser and the plaintiff had, but the defendant had not, notice of the non-acceptance or of the protest. (*a*)

And for a further plea in this behalf [to the —— count of the declaration,] the defendant further says, that heretofore and before the said bill in [that count of] the declaration mentioned, became due, or was presented for payment, and after the indorsement to G. H. (the third indorsee), and before the indorsement to the plaintiff, to wit, on the —— day of ——, A.D. ——, the bill was presented to the said C. D. (the drawee) for his acceptance, but the said C. D. then refused to accept the same, and the said bill was thereupon protested for non-acceptance. And the defendant says, that he had not due notice of the non-acceptance of the said bill or of its having been so protested as hereinbefore mentioned (*b*). And the defendant further says, that the plaintiff and the said G. H. at the time of the said indorsement to the plaintiff, had notice that the said bill had been so presented for acceptance and refused and protested for non-acceptance. And this the defendant is ready to verify, &c.

To action by indorsee against the drawer of a bill, plea that the bill was given in payment for hops sold by the plaintiff to the defendant, and that the hops were not delivered. (*c*)

And for a further plea in this behalf [to the —— count of the declaration,] the defendant says, that the said bill of exchange in the declaration [*or*, "in

(*a*) See *Whitehead* v. *Walker*, 9 M. & W. 506; *de injuria* is a good replication to this plea, *Id. ibid.*

(*b*) This averment, that the defendant had not due notice of the non-acceptance of the bill, &c. is unnecessary, and the plea would be good without, because, on non acceptance and protest thereon, the holder (and the plaintiff having taken the bill with notice of the presentment and dishonour, stands in the same situation as the indorser who presented) has an immediate right of action against the drawer, and does not acquire a fresh right of action on the *non-payment* of the bill when due, for the drawer in fact enters into one contract only, namely, in the case of a bill made payable after sight, that the drawee shall, on the bill being presented to him in a reasonable time from the date, accept the same, and, having so accepted it, shall pay it when duly presented for payment according to its tenor; and in the case of a bill payable after date, that the drawee shall accept it if it is presented to him before the time of payment, and having so accepted it, shall pay it when it is in due course presented for payment; or if it is not presented for acceptance at all, then that he shall pay it when duly presented for payment; *Whitehead* v. *Walker*, 9 M. & W. 506.

(*c*) See *Wells* v. *Hopkins*, 5 M. & W. 7, A plea of want of consideration must show a total failure of consideration; and where to an action on a bill of exchange for 20*l.* 8*s.* 6*d.*, the defendant pleaded that it was agreed between him and the plaintiff that the plaintiff should do certain carpenter's work for the sum of 63*l.*; that the defendant paid to the plaintiff 43*l.* on account, and accepted the bill for the residue; that the plaintiff neglected to do certain part of the work, and did the other part in an unworkmanlike manner, and that the sum of 43*l.* paid on account was more than the value of the work done; the plea was held bad after verdict, as showing only a partial failure upon each and every part of the entire consideration; *Trickey* v. *Larne*, 6 M. & W. 278; S. C. 8 Dowl. 174; and see *Myers* v. *Lazarus*, 1 Dowl. N. S. 316. To an action by the payee against the maker of a promissory note payable on demand, a plea that the note was given for the purchase-money of land agreed to be sold by the plaintiff to the defendant, and that no memorandum or note of the contract in writing was signed by the defendant or any person lawfully authorized by him; and that there was not any consideration or value for the making or payment of the note, except aforesaid, was held bad on general demurrer; *Jones* v. *Jones*, 6 M. & W. 84.

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that count"] mentioned, was drawn, accepted and indorsed as therein also mentioned, in payment of the price of divers, to wit, —— pockets of hops, just before then, to wit, on the —— day of ——, in the said year ——, sold by the plaintiff to the defendant as and for hops of a certain planter, to wit, one C. H., and answering certain samples then produced and shown by the plaintiffs to the defendant, and to be within a reasonable time after the said drawing, acceptance and indorsement of the said bill delivered to the defendant; and the defendant in fact says, that although a reasonable time for the delivery of the said hops had at the commencement of this suit elapsed, yet the plaintiff has not delivered any pockets of hops answering the said samples or either of them, or any hops whatsoever, but the plaintiff has hitherto neglected and wholly refused so to do; and the said hops so sold to the defendant as aforesaid remain and are wholly undelivered; and the consideration on which the said bill was drawn, accepted and indorsed as aforesaid has wholly failed. And the defendant further says, that, save as aforesaid, there never was any value or consideration whatsoever for the drawing, acceptance or indorsement of the said bill as in the [first count of the] declaration mentioned, or for the payment to the plaintiff of the amount thereof, or any part thereof. And this the defendant is ready to verify, &c.

Plea that the bill was for the price of a cow sold by plaintiff to defendant, and warranted sound, which she was not, and died.

See the form of plea in *Low* v. *Burrows*, 2 A. & E. 483; 4 Nev. & Man. 366; and 1 Harr. & Wol. 12, S. C.

Plea to first and second counts by drawer of bills, that one B. applied to plaintiff for the loan of £300, and he assented to advance £200 in cash, and £100 in wine, and payment to be secured by the bills declared on, and the contract was a gross fraud, and the wine has not been delivered, &c. (*d*)

That before and at the time of the making of the said several bills of exchange by the defendant in those counts and each of them respectively mentioned, to wit, on the said 13th April, 1835, the said J. P. B. was in want of a loan of a sum of money, to wit, the sum of £300, and then applied to the plaintiff to lend and advance him the same, but which the plaintiff was unwilling to do unless the said J. P. B. would accept the same partly in money and partly in wine, that is to say, two-thirds money and one-third wine, and would pay for the same by the plaintiff's having the security of a bill or bills drawn by the defendant and accepted by the said J. P. B. And the defendant saith, that the said J. P. B. then consented and agreed to the said terms, and gave notice thereof to the de-

(*d*) See form and decisions in *Connop* v. *Holmes*, 1 Tyr. & Gr. 85. To an action against the acceptor by the drawer and payee of a bill of exchange for 25*l.* 10*s.* 3*d.* drawn in November "for value received to Michaelmas last," the defendant pleaded that before the acceptance the defendant held a messuage, &c. as tenant to the plaintiff, at a certain rent, and that the bill was drawn and accepted in payment by anticipation, amongst other considerations, of 12*l.* 10*s.* part of the said rent not then due, and that before the drawing and acceptance of the bill the plaintiff assigned the messuage to J. S. of which the defendant had no notice until after such drawing and acceptance; that after the bill became due, and before the commencement of the suit, J. S. gave notice of the assignment to the defendant, and required and received the 12*l.* 10*s.* rent from him; and that therefore the consideration of the acceptance as respected the 12*l.* 10*s.* wholly failed. The plea was held bad on the ground that it answered only *part* of the consideration, though it pleaded to the bill generally, and that fraud was not necessarily to be inferred from the statement in the plea; *Clark* v. *Lazarus*, 2 M. & G. 167. See plea to an action on a promissory note, that the real consideration for the note was services to be thereafter rendered by the plaintiff which had never been performed, *Abbott* v. *Hendricks*, 1 M. & G. 791. *Quære*, whether such a plea should allege that the time for performing the services had elapsed; *Id. ibid.*

fendant, and that thereupon the said two several bills of exchange in the first and second counts respectively mentioned were accordingly drawn by him the defendant, and accepted by the said J. P. B. And the defendant further saith, that he never received any consideration or value, nor did any consideration ever move or pass from the said parties or either of them to the defendant for the drawing by him of the said several bills of exchange or either of them, except as aforesaid. And he further saith, that the said wine hath not nor hath any part of it hitherto been delivered, and that the said contract for the sale and delivery thereof was a gross fraud upon the defendant. And this the defendant is ready to verify, &c.

Plea in action by indorsee against acceptor, that the bill was drawn and accepted *for the accommodation of plaintiff*, and on his agreeing that no claim should be made on defendant or the drawer. (*e*)

And for a further plea in this behalf [to the —— count of the declaration], the defendant says, that the said bill of exchange in [that count of] the declaration mentioned was drawn and made by the said H. R. [*the drawer*], at the request of and for and by way of accommodation of and for the plaintiff, and the same was also accepted by the defendant at the request of H. R. *for and by way of like accommodation of and for the plaintiff* (*f*), and that at the time of the so drawing and making and accepting the said bill of exchange it was *agreed* by and between the said parties, that if the said bill of exchange should happen to be outstanding when it became due it should be taken up and paid by the plaintiff, and that no claim or demand should at any time be made against the defendant or the said H. R. upon or in respect of the same. (*f*) And this the defendant is ready to verify, &c.

Plea that defendant accepted the bill for the accommodation of the drawer and without consideration, and that it was indorsed to the plaintiff without value. (*g*)

And for a further plea in this behalf [to the —— count of the declaration], the defendant says, that the said bill of exchange in the declaration [*or* "in that count"] mentioned, was accepted by the defendant at the request of and for the accommodation of the said A. B. [*the drawer*], and without any value or consideration whatever for the said acceptance or payment thereof by the plaintiff. And the defendant further says, that the said bill of exchange was indorsed to the plaintiff as in the [said —— count of the] declaration mentioned, without any consideration or value given by him for such indorsement thereof. And this the defendant is ready to verify, &c.

(*e*) See this plea, *Thompson* v. *Clubley*, 1 M. & W. 212; and see *Charles* v. *Marsden*, 1 Taunt. 224. To an action by the payee against the makers of a promissory note, a plea that there was no consideration for the note, and that it was made subject to the condition that the defendants should not be called upon to pay the same if they were not able, but that it should be renewed, is bad, and, on affidavit that it was false, the Court set it aside; *Mitford* v. *Finden*, 8 M. & W. 511.

(*f*) The Pleading Reg. Gen. Hil. T. 4 W. 4, shows that the word "*accommodation*" is to be understood in the popular mercantile sense and as synonymous to "without consideration." It is advisable, in addition to the allegation "for the accommodation," according to the facts, to state in the plea any other express terms of agreement, as that the party accommodated agreed to provide money or to pay the bill at maturity. It must also be shown *what other facts exist to affect the plaintiff's claim*, for otherwise it will be inferred, till the contrary be averred and proved, that he is a *bona fide* holder for full value, and the plea will be demurrable.

(*g*) An averment that the bill was indorsed to the plaintiff after it became due is insufficient. It must be shown, either that the plaintiff took it without value, as in the above form, or that the bill was indorsed to the plaintiff after it was due, contrary to agreement; *Sturtevant* v. *Ford*, 4 M. & G. 101. And an averment that the plaintiff took the bill after it was due with notice of the defendant's want of consideration would not raise a sufficient defence; *Lazarus* v. *Cowie*, 2 G. & D. 487.

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Plea by acceptor that he had no consideration, and that the bill was negociated by fraud, and that no consideration was given for the bill by the holder. (*g*)

And for a further plea in this behalf [to the —— count of the declaration] the defendant says, that there was not at any time any consideration or value for the defendant's accepting the said bill of exchange [in that count mentioned] or paying the amount thereof, or any part thereof; and that the said bill so indorsed by the said W. C. was afterwards, to wit, on &c. delivered on behalf of the defendants to one T. H. *for a special purpose only*, to wit, that the said T. H. should keep and take care of the said bill for and on behalf of the defendants, and for their use and benefit, and not for the purpose of being negociated or delivered over by him to any other person or persons whatsoever; and the defendants further say, that the said T. H. then took and received, and from thence until the plaintiff became possessed of the same as hereinafter mentioned, held the said bill for the special purpose aforesaid; and the defendants further say, that the said T. H. in violation of good faith and contrary to the said special purposes for which he so received and held the said bill as aforesaid, heretofore, and whilst he held and had the same in his possession for the special purpose aforesaid, to wit, on the day and year last aforesaid, fraudulently and without the authority of the defendants, and with intent to defraud the defendants, negociated and parted with the said bill for his own use and benefit, and then delivered the said bill so indorsed as aforesaid to the plaintiffs; and the defendants further say, that the said bill was not at any time indorsed to the plaintiffs otherwise than by the said T. H. so delivering the same so indorsed by the said W. C. as aforesaid to the plaintiffs: and the defendants further say, that the plaintiffs, at the time when the said bill was so delivered to them as aforesaid by the said T. H. as aforesaid, had notice of the premises and well knew that the said T. H. had no power or authority to negociate or part with the same on his own account; and that there was not at any time any consideration or value given in good faith for the said indorsement of the said bill of

(*g*) *Bramah* v. *Roberts*, 1 Bing. N. C. 469; 3 Dowl. 393, S. C. See similar plea by drawer, *Uther* v. *Rich*, 2 P. & D. 579; by maker of promissory note, *Phillips* v. *Cole*, 2 P. & D. 288. *Semble*, that a plea to a declaration against the acceptor of a bill of exchange indorsed by the drawer to the plaintiff, that the defendant accepted it on account of a debt due from him to the drawer, that the drawer indorsed it in blank and delivered it to the plaintiff as agent for R., for the purpose that the plaintiff should deliver it to R. in payment of a debt due from the drawer to R.; that the plaintiff gave no consideration for it and wrongfully retained it in breach of his duty as R.'s agent, that R. claimed to be entitled and dissented from the plaintiff's suing; is bad on special demurrer, for not expressly admitting the indorsement to the plaintiff and as an argumentative traverse of the indorsement, but that as it is a *constructive* denial of the indorsement to the plaintiff, it is good after verdict; *Adams* v. *Jones*, 12 A. & E. 455; 4 P. & D. 174, S. C. To an action of *debt* by the payee against one of the two makers of a joint and several promissory note, the defendant pleaded that he signed as surety merely, and that he never had any value or consideration for the note; the plaintiff replied that the defendant had value and consideration, and the defendant demurred on the ground that the plea had shown no consideration, or a consideration that would not support debt, but the Court gave judgment at once for the plaintiff; *Sisson* v. *Kidman*, 3 M. & G. 816. In an action by indorsee against acceptor, a mere plea that defendant had *no consideration* is bad; *Low* v. *Chifney*, 1 Bing. N. C. 267; *Domer* v. *Chelford*, 5 M. & Scott, 97; *Reynolds* v. *Joemy*, 3 Dowl. 453. But the general plea would be aided by verdict: *Easton* v. *Pratchett*, 3 Dowl. 472; 4 Tyr. 472, S. C. (In error, 4 Dowl. 549.) The plea since the new rules must state what the *real consideration* or facts were, as that it was an accommodation bill; *Id. ibid.* When the action is by an indorsee, the plea must not only aver that the defendant accepted for the accommodation of the drawer, but also show on what ground that fact is to affect the plaintiff, as by also averring that he gave no value, or received the bill with notice of a fraud against defendant. See plea to action by the holder against the drawer of a banker's cheque, that the defendant drew the cheque for the accommodation of the payee, and that it was indorsed to the plaintiff without consideration, *Bosanquet* v. *Corser*, 8 M. & W. 142.

exchange to the plaintiffs as in the declaration mentioned. (*h*) And this the defendant is ready to verify, &c.

To action by second indorsee against acceptor, plea, that the bill was an accommodation bill, indorsed for the purpose of being discounted and indorsed to the plaintiff in fraud of defendant after it was due. (*i*)

And for a further plea in this behalf [to the —— count of the declaration], the defendant says, that the said L. M. drew, and the defendant accepted the said bill in the declaration [*or*, "in the —— count"] mentioned, for the accommodation of the defendant, and that the said L. M. might get it discounted and thereby raise money for the use of the defendant, and without any value or consideration given by the said L. M. for the acceptance of the defendant. And the defendant further says, that the said L. M. indorsed the said bill to the said D. E. without having received any consideration, and for the purpose aforesaid, and the said D. E. received the said bill for the purpose of discounting it, but did not do so, nor did he pay the defendant or the said L. M. any money on account of the said bill, or otherwise give the defendant or the said L. M. any value or consideration for the same, and on the contrary, the said D. E. having notice of all the premises, indorsed the said bill to the plaintiff in fraud of the defendant; and the defendant further says, that the plaintiff took the said bill by indorsement from the said D. E. after it became due, to wit, on the —— day of —, A. D. ——. And this the defendant is ready to verify, &c.

To an action on a promissory note made by the defendant, payable twelve months after date to the plaintiff, plea that A. at the time of his death was indebted to the plaintiff for goods sold, that the defendant in respect of such debt, and at the plaintiff's request and for no other consideration whatever, made the note; that A. died intestate, and that at the time of the making of the note no administration had been granted of his effects, nor any person liable for the debt so due to the plaintiff, and that there never was any consideration for the note except as aforesaid. (*k*)

And for a further plea in this behalf [to the —— count of the declaration], the defendant says, that one J. W. before and at the time of his death and before the commencement of this suit, to wit, on the —— day of ——, A. D. ——, was indebted to the plaintiff in a certain sum of money, to wit, the sum of £——, for the price and value of goods by the plaintiff before then sold and delivered to the said J. W., which said sum of money was due and owing to the plaintiff at the time of the making of the promissory note in the [—— count of the] declaration mentioned: and thereupon, the plaintiff, after the death of the said J. W. and before the making of the said note, to wit, on the —— day of ——, A. D. ——, applied to the defendant for payment of the said sum of £——, whereupon, in compliance with the said request, the defendant, after the death of the said J. W., for and in respect of the said debt so then remaining due to the plaintiff as aforesaid, and for no other consideration whatever, then made and delivered the said note to the plaintiff, and the defendant further says, that the said J. W. died intestate, to wit, the same day and year aforesaid, and that at the time of the making and delivery of the said note to the plaintiff as aforesaid no administration had been granted of the estate and effects of the said J. W., nor was there at that time any executor or executrix of the estate and effects of the said J. W., nor was there at that time any person liable for the said debt so remaining due to the plaintiff as aforesaid; and the defendant further says, that there never was any consideration for the said note except as aforesaid. And this the defendant is ready to verify, &c.

(*h*) A mere allegation, in addition to this, that the plaintiff was not a *bonâ fide* holder, would not enable the defendant to give evidence of fraud in the plaintiff, as such an allegation, connected with the rest of the plea, means only that the plaintiff had not given good consideration for the bill; *Uther* v. *Rich*, 2 P. & D. 579.

(*i*) See *Lewis* v. *Parker*, 4 A. & E. 838; and "*Replication*," *post*.

(*k*) See *Nelson* v. *Serle*, 4 M. & W. 795.

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Plea that the defendant signed the *promissory note* only on condition that plaintiff should cause another person also to sign it, which plaintiff never did. (*l*)

And the defendant, as to the first count of the said declaration, says, that the defendant made the said supposed promissory note in writing in that count mentioned, on the —— day of ——, A. D. ——, and delivered the same to the plaintiff for the purpose that the plaintiff should procure, or cause to be procured, one T. C. to place his name and become a party thereto, as one of the makers thereof; and upon this special condition, that is to say, that if the plaintiff did not procure, or cause to be procured, the said T. C. to place his name and become a party to the note as one of the makers thereof, or if the said T. C. did not place his name thereto, or become a party to the said note as one of the makers thereof, that then and in that case the said promissory note should not be the promissory note of the defendant, and that the same as to him should be annulled and of no force and effect, and held for nothing, and that he should not in any way be liable thereon, or be called on or compelled to pay the same or any part thereof; and the defendant further saith, that the plaintiff hath not yet procured or caused to be procured the said T. C. to place his name or become a party to, nor hath the said T. C. placed his name or become a party to, the said promissory note; but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse. And this the defendant is ready to verify, &c.

Plea in assumpsit by indorsee of a bill against acceptor, that defendant was an accommodation acceptor, and other facts. (*m*)

And for a further plea in this behalf, to the [first] count of the declaration, the defendant says, that he the defendant accepted the bill for the accommodation of R. S., and without any value or consideration, and that the said indorsement by R. S. in the first count mentioned was an indorsement in *blank*, and that R. S. never delivered the said bill to the said N. O., but that he delivered it to one K. L., and the said K. L. then received, and from thence, until one L. M., as hereinafter mentioned, first became possessed thereof, held the same for a specific purpose, for the sole use and benefit of the said R. S. and not otherwise, to wit, for the purpose and in order that he the said K. L. might get the said bill discounted for the said R. S., and that he should deliver and pay the proceeds thereof upon such discounting to the said R. S., and of which the said L. M. before and at the time when the said bill was delivered to him as hereafter mentioned had notice; and the defendant further saith, that the said K. L. fraudulently and covinously, in violation of good faith and contrary to the said purpose for which he received the bill, afterwards, to wit, on the 12th day of October, 1834, delivered the same to the said L. M., and the said L. M. took and received the same from the said K. L. upon other and different terms, and without discounting the same for the said R. S., and contrary to the said special purpose, and in breach and violation thereof, to wit, for the purpose and under colour and pretence of securing a debt then alleged to be due from the said K. L. to the said L. M., and the said N. O., J. L. and the plaintiff,

(*l*) In an action by the payee against the maker of a joint and several promissory note, the defendant must plead specially a defence that he signed the note as surety on the faith that other persons would also sign, and that the name of one of them who had so signed was cut off from the note; *Mason* v. *Bradley*, 11 M. & W. 590. *Semble*, that a plea alleging the cutting off of the signature would be sufficient, without the averment that the defendant signed on condition of the party whose name had been removed also signing; *Id. ibid.*; *Pigot's case*, 11 Rep. 286.

(*m*) See form in *Noel* v. *Boyd*, 1 Tyr. & G. 211; and see plea between the same parties of accommodation acceptance and other facts, *Deacon* v. *Stodhart*, 2 M. & G. 318.

before and at the said time when the said bill was so indorsed to them respectively as aforesaid, and when they first respectively received the same, had notice of the premises aforesaid; and the defendant in fact saith, that no consideration or value whatever, except as aforesaid, hath been given or had and received by the said R. S., or to or by any other person on his behalf, or at his request, for and on account of the said indorsements of the said bill by the said R. S.; and further, that the plaintiff hath not been nor is he the *bond fide* holder of the said bill for any value or consideration made, done or given by him in that behalf. (*n*) And this the defendant is ready to verify, &c.

Plea by maker of promissory note that he delivered it to the plaintiff for the purpose of paying debts due by the defendant to third persons, but that the plaintiff had not paid them, and that the defendant had received no consideration for the note. (*o*)

And for a further plea in this behalf, as to the [first] count of the declaration, the defendant says, that the said note in that count mentioned was made by him on the faith and for the purpose of the plaintiff paying, for and on account of the defendant, divers sums of money due and owing from the defendant to divers persons, to wit, &c. [*insert the sums and the names of the creditors*], amounting in the whole to the sum specified in the said note, to wit, the sum of £——, and the plaintiff then received the said note on the terms and for the purpose aforesaid, and no other, and then promised the defendant to pay the said several sums amounting to the said sum of £—— in manner aforesaid, but hath not paid the same or any or either of them or any part thereof to the several persons above mentioned or any or either of them, but the said debts and sums of money are and each of them is still wholly unpaid, and the defendant is still liable to pay the same to the several persons aforesaid. And the defendant avers that except as aforesaid he has received no consideration, nor has the plaintiff given any for the said note. And this the defendant is ready to verify, &c.

Plea in action by the indorsee against acceptor of a bill, that it was accepted for a special purpose, and indorsed contrary to such purpose when it was overdue and with notice. (*p*)

And for a further plea in this behalf, to the [first] count of the declaration, the defendant says, that before and at the time of his accepting the bill of exchange in that count mentioned, he the defendant was indebted to one J. M. in the sum of money in the said bill mentioned, and thereupon the said W. H. drew the said bill, and the defendant accepted the same for a special purpose only, that is to say, that after the acceptance of the said bill by the defendant, and after his delivery thereof to the said W. H. and before the same should become due and payable, he should hold the same for the sole use and benefit of the defendant, and should get the same discounted for

(*n*) To an action by the indorsee against the acceptor of a bill of exchange, a plea that there was no consideration for the drawing or accepting of the bill, or for the indorsements, is it seems bad, at least on special demurrer, unless it alleges that *the plaintiff gave no consideration for the bill*; *Arbouin* v. *Anderson*, 1 G. & D. 403; 9 Dowl. 595, S. C. To an action between the same parties, a plea that after the bill became due the drawer paid a sum of money and did work for the plaintiff to the amount of the bill, and that the plaintiff received the same in satisfaction and discharge of the amount of the bill and all damages, &c., and further that the defendant accepted the bill for the accommodation of the drawer, and without value, and that the plaintiff held the bill without consideration or value, is bad for duplicity; *Purssord* v. *Peek*, 9 M. & W. 196.

(*o*) See plea, *Cole* v. *Cresswell*, 11 A. & E. 661; 3 P. & D. 404, S. C. See plea in action by the payee against the maker of a promissory note, that it was obtained by a threat and without consideration, and Replication, *Atkinson* v. *Davies*, 11 M. & W. 236.

(*p*) See *Eden* v. *Turtle*, 10 M. & W. 635. A replication to this plea, that the drawer did not hold the bill for the said special purpose *and* for the sole use and benefit of the defendant, was held not to be too large, as it did not compel the defendant to prove more than he would otherwise be bound to prove in support of his plea; *Id. ibid.*

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him, and that upon such discounting the said W. H. should deliver and pay the proceeds of the bill to the said J. M. in satisfaction and discharge of the said debt so due from the defendant to her, and not otherwise. And the defendant further says, that thereupon, at the request of the said W. H. and before the said bill became and was due and payable, he the defendant then accepted the said bill for the same special purpose, and not otherwise; and that at the like request of the said W. H., he the defendant delivered the same to him, who then received, and from thence, until the delivery thereof to the plaintiff, held the same for such special purpose as last aforesaid, and for the sole use and benefit of the defendant, and not otherwise; and the defendant further says, that the last mentioned acceptance and the said acceptance in the declaration mentioned are one and the same acceptance, and that, except as aforesaid, there never was any value or consideration whatever given for the acceptance of the said bill by the defendant, or for the payment by him of the amount thereof. And the defendant further says, that afterwards and after the same bill became due, to wit, on the —— day of ——, A. D. ——, the said W. H., against good faith, and contrary to the said purpose for which he received the said bill, and without the knowledge or consent of the defendant or of the said J. M., indorsed and delivered the said bill to the plaintiff, who then received the same from the said W. H. upon other and different terms and contrary to the said special purpose, and in breach and violation thereof, to wit, under colour of a debt due to the plaintiff from the said W. H., and with notice that the said bill was overdue. And this the defendant is ready to verify, &c.

To action by drawers against acceptor of two bills, plea that an illegal company had been formed, that they had accepted bills in furtherance of the purposes of the company,—that the plaintiffs had become the indorsees and holders of two of the bills, —that it was agreed between the plaintiffs (having notice) and the company that the bills should be renewed, that in pursuance of such agreement the company accepted the bills (the defendant then being a member), and upon no other consideration. (q)

And for a further plea in this behalf to the first and second counts of the declaration, the defendant says, that before the making of the bills of exchange hereinafter in this plea mentioned, or any of them, and before the making of the bills of exchange in the said first and second counts mentioned, or either of them, to wit, on the —— day of ——, A. D. ——, it was agreed between Lewis Levason, George Frederick Baker, and divers other persons, in manner following, that is to say, that the said L. L., G. F. B., and the said other persons, should form a public joint stock company, under pretext of carrying on, by means of such company, the trade and business of mining, and that the said company should consist of a great number of members, to wit of 5000 persons, and that the said company should become possessed of and interested in divers lands, tenements, hereditaments, and personal estate; and the profits from time to time arising from the trade and business which the said company might carry on should be divided into a great number of shares, to wit, 23,600 shares; and that the interest in such shares should be vested in the said members of the said company in various proportions; and that the interest in the said lands &c. should be vested in the said members of the said company in proportion to the numbers of the said shares in which they were respectively interested as aforesaid; and that the said company should act as a corporate body; and that the same shares should be transferable without any restriction, notwithstanding that the said company had not obtained, and notwithstanding that

(q) See *Scott* v. *Chappelow*, 4 M. & G. 386. The plaintiff may reply *de injuria* to this plea; *id. ibid.*

the said company might not obtain, before or during the time of their so acting as such corporate body, or before or during the time while the said shares should be so transferable without restriction, any act of parliament or charter of incorporation, or any grant by letters-patent or otherwise, enabling the said company so to act as a corporate body, or legalizing the transfer of the said shares, without restriction as aforesaid. And further, that after the making of the said agreement, and before the drawing of the bills of exchange hereinafter in this plea mentioned, or any of them, and before the drawing of the bills in the said first and second counts mentioned, or either of them, to wit, on the day and year last aforesaid, the said L. L., G. F. B., and the said other persons did succeed in forming the said company, and that the same was then formed by and then consisted of the said persons who so agreed to form the same, being a great number of persons, to wit, 2000 persons, who then became and were the members of the said company; and that the said company did then, in pursuance of the said agreement, purchase for the purposes of the said company, and did then become and be, and thence continually up to and at the several times of the drawing of the several bills of exchange hereinafter mentioned, and at the time of the making of the said bills of exchange in the said first and second counts mentioned, were, for the purposes of the said company, possessed of and interested in divers lands &c., and did during and at the several times last aforesaid carry on divers trades and businesses; and that the said lands &c. whereof and wherein respectively the said company were so possessed and interested respectively, and the profits from time to time arising from the trade and business which they so carried on as aforesaid, were during and at the several times last aforesaid divided into a great number of shares, to wit, 23,600 shares; and that the interest in the said shares, during and at the several times last aforesaid, was vested in the members of the said company for the time being in various proportions; and that the interest in the said lands &c., at the said several times last aforesaid, was vested in the members of the said company for the time being, in proportion to the number of such shares in which such members for the time being respectively were interested as aforesaid; and that the said members of the said company were subject to the liabilities of the said company as between themselves in like proportions; and further, that during and at the several times last aforesaid, the said company did presume to act and did act as a corporate body, and did profess that the shares aforesaid were transferable without any restriction, and did pretend to transfer the said shares; and that during and at the said several times last aforesaid the said shares were transferable without any restriction; and that at the said several times of the making of the said agreement and of the formation of the said company, and during and at the said several times last aforesaid, the said undertaking and project of the said company was an attempt tending to the common grievance, prejudice and inconvenience of great numbers of the subjects of her majesty the then and now queen, in their trade and other lawful pursuits; and further, that no act of parliament was ever passed, and that no charter of incorporation or letters-patent ever was or were made or granted, whereby the said company was authorised to act as a corporate body, or whereby the transfer of the said shares or the existence of the said company was rendered legal; of all which premises the said L. L. and G. F. B. always had

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notice and knowledge. And further, that at the said time when it was so agreed to form the said company the said L. L. and G. F. B. were interested in divers of the lands and tenements and hereditaments afterwards purchased by the said company in the manner hereinafter mentioned, and had expended divers sums of money in mining operations therein, and were also possessed of divers machinery and effects then being thereupon; and it was then agreed between the said L. L. and G. F. B., and the other members of the said company, that the said company should purchase the interest of the said L. L. and G. F. B. in the said lands &c., (including the value of the said mining operations) and the said machinery and effects, from the said L. L. and G. F. B. for the purposes of the said company; and the said company then did accordingly, for the purposes of the said company, purchase from the said L. L. and G. F. B., and then became and were possessed of and interested in, for the purposes of the said company, the interest of the said L. L. and G. F. B. in the said lands &c. (including the value of the said mining operations therein,) and the said machinery &c., which said lands &c., machinery &c., then became and were parcel of the lands, tenements, hereditaments and personal estate whereof and wherein the said company is hereinbefore alleged to have become possessed and interested as aforesaid. And further, that at the said time of the said agreement between the said company and the said L. L. and G. F. B., it was agreed, that as an equivalent for and in exchange and payment for the said interest of the said L. L. and G. F. B. in the said lands &c. (including the value of the said operations,) and the said machinery &c., the said L. L. and G. F. B. should be paid by the said company divers sums of money, amounting to the sum, to wit, of £20,000, and that the said L. L. and G. F. B. should receive from the said company and become and be the owners of divers, to wit, 1100 of the said shares. And further, that after the making of the said last-mentioned agreement, to wit, on the day and year last aforesaid, the said company accepted divers negociable bills of exchange, drawn by the said L. L. and G. F. B. jointly, and by the said L. L. and G. F. B. severally, upon the said company, for divers sums of money, amounting, to wit, to the sum of £20,000, and then delivered the said bills to the said L. L. and G. F. B. on account of the said sum so agreed to be paid to them as aforesaid; and the said L. L. and G. F. B. then accepted the said bills from the said company on account of the said sum so agreed to be paid to them as aforesaid. And further, that afterwards, to wit, on &c., the plaintiffs became and were the indorsees and holders of two of the said bills so accepted by the said company and delivered to the said L. L. and G. F. B. on the account aforesaid. And further, that afterwards, to wit, on the day and year last aforesaid, it was agreed between the said company and the plaintiffs, that the said bills, whereof the plaintiffs were the indorsees and holders as aforesaid, and which were then due and payable, should be renewed in manner hereinafter mentioned; and thereupon afterwards, to wit, on the day and year last aforesaid, the said company (the defendant then being a member thereof and shareholder therein) accepted the bills of exchange in the said first and second counts of the declaration mentioned, and then delivered the same to the plaintiffs in lieu of and in satisfaction for the said bills of exchange whereof the plaintiffs were the holders and indorsees as aforesaid, and upon no other account and for no other consideration whatever; and

further, that the plaintiffs always, before and at the said several times of their becoming indorsees and holders of the said bills hereinbefore in that behalf mentioned, and of the making of the agreement with them in that behalf hereinbefore mentioned, and of the said accepting of the said bills in the said first and second counts of the declaration mentioned, and before the plaintiffs ever gave any value or consideration for the said bills whereof they were the holders and indorsees as aforesaid, or either of them, to wit, on the day and year last aforesaid, had notice and knowledge of the premises and matters in this plea mentioned, and every of them. And this the defendant is ready to verify, &c.

See plea, *Fox* v. *Frith*, 10 M. & W. 131.

Plea in an action by the payee against the makers of a promissory note, that the defendants made the note as directors and on behalf of a mining co-partnership, and that the plaintiff was a partner with the defendant.

And for a further plea in this behalf, [to the —— count of the declaration] the defendant says, that before and at the time of indorsing the said bill of exchange by the said S. T. [*the drawer*] as in the declaration [*or* "in that count"] mentioned, the said S. T. was and still is indebted to the defendant in the sum of £——, for work and labour, money lent, and on an account stated, payable on request, to an amount exceeding the amount of the said bill of exchange and of all damages thence resulting. And the defendant further says, that the said S. T., whilst the said money was due and unpaid to the defendant, and after the bill of exchange in the [—— count of the] declaration mentioned became due, in order to deprive the defendant of his right of set-off in respect of the aforesaid debts, did, in fraud of the defendant, and in collusion with the said A. B., C. D., and the plaintiff, indorse the said bill to the said A. B., who indorsed the same to the said C. D., who indorsed it to the plaintiff, which said indorsements are the indorsements in the [said —— count of the] declaration mentioned, in order to enable the plaintiff to sue the defendant on the said bill, and without any consideration for the said indorsements, or any or either of them.

To action by third indorsee against acceptor of a bill, plea that the drawer was indebted to the defendant, and that the drawer, after the bill became due, fraudulently indorsed it, to deprive the defendant of his set-off and without consideration. (r)

(r) See *Watkins* v. *Benusan*, 9 M. & W. 422. The indorsee of an over-due bill or note takes it subject to all the equities arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it; and therefore, to an action by the indorsee of an over-due note against the payee, a distinct debt due to the payee from a prior indorsee cannot be set off; *Whitehead* v. *Walker*, 10 M. & W. 696. Where to an action by the indorsees against the maker of several promissory notes, one of which was payable at three months date, and the others on demand, the defendant pleaded, that after the making of the notes, and before the indorsement of any of them to the plaintiffs, and whilst T. L. (who indorsed to the plaintiffs) was the holder of them, T. L. was indebted to the defendant and to J. D. as executors in a sum exceeding the amount of the notes, for money lent by their testator, &c., in which sum the defendant was beneficially interested as residuary legatee; and that before the indorsement of the notes to the plaintiffs, and while T. L. was the holder, it was agreed between him and the defendant and J. D., that the amount of the notes, and the monies due thereon, should be set off and allowed to him out of the monies so due from him to them, and that the defendant and T. L. should mutually be discharged from that amount; that the notes and the monies due thereon were thereby satisfied and discharged; and that they remained in the possession of T. L. until he indorsed them to the plaintiffs without the consent or fault of the defendant, and T. L. indorsed them to the plaintiffs, and the plaintiffs took them after they had been so satisfied; and the plaintiffs replied, that the notes were not satisfied and discharged as in the plea mentioned. It was held, after verdict for the defendant on this issue, that the plea was bad for not showing distinctly that the notes were overdue when indorsed by T. L. to the plaintiffs, and that the plaintiffs were entitled to judgment non obstante veredicto; *Cripps* v. *Davis*, 12 M. & W. 159.

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And the defendant avers, that the plaintiff sues in this action as agent of the said S. T., according to the said fraud and collusion. And the defendant further says, that the sum of money due to the defendant from the said S. T., as in this plea mentioned, is still due and owing and unpaid from the said S. T. to the defendant. And this the defendant is ready to verify, &c.

Plea as to part, that defendant accepted the bill for accommodation of plaintiff, (*s*) and as to the residue payment into Court. (*t*)

And for a further plea in this behalf, as to £35, parcel of the monies in the said —— count of the declaration mentioned, the defendant says, that as to the said sum of £35, parcel as aforesaid, he accepted the said bill of exchange so far as respects the said sum of £35, for the accommodation of the plaintiff, and upon the terms that if defendant should pay the said sum of £35, the same should be returned to him, and that he should not be liable or called upon to pay the said sum to the plaintiff. And the defendant further says, that the plaintiff always held and still holds the said bill under those terms. And this the defendant is ready to verify, &c. And as to the residue of the declaration, the defendant says, that the plaintiff ought not further to maintain his action thereof against the defendant, because he now brings into Court here the sum of £——, ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages to a greater amount than the said sum of £—— in respect of the residue of the causes of action in the declaration mentioned. And this the defendant is ready to verify, &c. wherefore he prays judgment if the plaintiff ought further to maintain his action thereof.

To action by drawer against acceptor of a bill, plea that it was given on account of a debt from which the defendant had been discharged under Insolvent Act. (*u*)

And for a further plea in this behalf [to the —— count of the declaration], the defendant says that heretofore, and before the accepting of the bill of exchange in the [said —— count of the] declaration mentioned, the defendant was indebted to a certain person, to wit, one G. M. in the sum of £——, and also to divers other persons, creditors of him the defendant, and being so indebted, heretofore and before the accepting of the said bill of exchange, to wit, on the —— day of —— A. D. ——, by an order of the Court for the Relief of Insolvent Debtors in England, the defendant, then being an insolvent debtor in actual custody at the suit of the said G. M. for the recovery of the said debt of £——, was ordered to be discharged from custody, and entitled to the benefit of a certain act of parliament made and passed in the session of parliament holden in the first and second years of the reign of her present Majesty, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England," as to the said debt of the said G. M., and the said several other creditors of him the defendant, as soon as he should have been in custody at the suit of one or more of them for the space of —— months from the —— day of —— A. D. ——, which period had elapsed before the commencement of this suit. And the

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(*s*) *Fallows* v. *Bird*, 4 Dowl. 184; 2 Crom. M. & Ros. 458, S. C.

(*t*) See *Jourdain* v. *Johnson*, 2 C. M. & R. 570; *Harris* v. *Bushell*, 2 Dowl. N. S. 514. It seems questionable whether a defendant can plead in bar payment of part of the amount of a bill of exchange or promissory note; *Lord* v. *Ferrand*, 1 D. & L. 630.

(*u*) See *Ashley* v. *Killick*, 5 M. & W. 509.

defendant says that he remained in custody at the suit of the said G. M. for the space of —— months from the said —— day of —— A. D. ——, according to the said order, at the end of which period, to wit, on the —— day of ——, in the year aforesaid, he the defendant was duly discharged according to the said act, of all which premises the plaintiff afterwards, to wit, on the day and year last aforesaid, had notice. And the defendant further says, that after he was so ordered to be discharged under the said act, and whilst he was in custody at the suit of the said G. M. as aforesaid, to wit, on the day and year in the [—— count of the] declaration mentioned, he the defendant, at the solicitation and request of the plaintiff (the plaintiff then being the attorney of the said G. M.) accepted the said bill of exchange in the [—— count of the] declaration mentioned (the same then being the said acceptance thereof therein mentioned) for and on account and to secure payment of or of part of the said debt or sum of £——, from which he the defendant had been so ordered to be discharged as aforesaid, and was so subsequently discharged as aforesaid. And the defendant further says that there never was any consideration or value for the acceptance of the said bill of exchange by the defendant, or for payment by him of the amount thereof, or any part thereof, to the plaintiff, except as aforesaid. And this the defendant is ready to verify, &c.

To action by the drawer against the acceptor of a bill, plea that the defendant was a bankrupt, and that the defendant accepted the bill in part payment of the debt due to the plaintiff, in consideration that the plaintiff would prove his debt under the fiat. (x)

And for a further plea in this behalf to the [first] count of the declaration, the defendant says that before and at the time of the making and accepting of the bill therein mentioned, the defendant was a bankrupt according to the statutes in force concerning bankrupts, and a fiat of bankruptcy had been issued, and was then duly in prosecution and force against the defendant, and the defendant was also then indebted to the plaintiff in a certain sum of money, to wit, the sum of £——, which debt was proveable by the plaintiff under the said fiat, and was and is barred by the defendant's certificate, which he has since duly obtained under the said fiat according to the statutes aforesaid; and thereupon, to wit, on the day and year in the said [first] count mentioned, in consideration that the plaintiff would prove the said debt due to him under the said fiat against the defendant, the defendant then agreed with the plaintiff to accept and did accept the said bill in the [first] count mentioned, as therein mentioned, by way of part payment of the said debt of £——, so to be proved under the said fiat. And the defendant further says, that there never was any consideration or value for the acceptance and payment of the said bill except as aforesaid, whereby the said bill was and is void. And this the defendant is ready to verify, &c.

Plea to an action on a bill that it was given to induce petitioning creditor to abandon fiat.

See the form *ante*, 40; *Davis* v. *Holding*, 3 Crom. M. & Ros. 159; and Tyr. & Gr. 377, S. C.; and see *Hankey* v. *Cobb*, 1 G. & D. 47.

Plea that a promissory note is not valid according to the law of the country where it was

And for a further plea as to the said first count, the defendant says, that at the time of the defendant's making the said note in the said first count mentioned, and from thence hitherto, by the law of the kingdom of France, wherein the said note was so drawn and made as in the declaration men-

(x) See *Goodered* v. *Armour*, 3 G. & D. 206.

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made, viz. *in not stating the nature of the consideration* for which it was given. (y)

tioned, no promissory note whatever is valid or effectual unless the nature of the consideration for which such note was made and given is fully stated and expressed on the face of such note, and that the words value received are insufficient for that purpose. And this the defendant is ready to verify, &c.

Plea by drawer or indorser, that the plaintiff gave time to the acceptor for adequate consideration until a renewed bill should have become due. (z)

And for a further plea in this behalf as to the said [first] count, the defendant says, that after the said bill of exchange in that count mentioned became due, to wit, on &c. [*about the real date,*] it was agreed by and between the plaintiff, then being the holder of the said bill, and the said E. F. [*the acceptor,*] without the defendant's consent, that the plaintiff should, for a certain good and sufficient consideration, to wit, the consideration hereinafter mentioned, give the said E. F. time for the payment of the amount due upon the said bill for a certain time, to wit, until the bill of exchange hereinafter mentioned to have been given to the plaintiff should become due according to the tenor and effect thereof, and that for securing the payment of the amount due upon the said bill in the said first count mentioned, and for and on account thereof, the plaintiff should draw upon the said E. F., and that he should accept a certain other bill of exchange, bearing date a certain day, to wit, the day and year last aforesaid, for the amount of the said first-mentioned bill, with interest due thereon and expenses in respect thereof, to wit, the sum of £——, payable at a certain time, to wit, three months after the date thereof, to the plaintiff or order. And the defendant further saith, that in pursuance of such agreement the plaintiff then drew and the said E. F. then accepted such last-mentioned bill for securing the payment of the amount due upon the said bill in the first count mentioned, with interest as aforesaid, and for and on account thereof; and the said E. F. then delivered the said bill so accepted by him as aforesaid to the plaintiff; and the plaintiff then received the same for and on account of the said bill in the first count mentioned, and all the monies due thereon, on the terms aforesaid, without the leave or consent of the defendant in that behalf. And this the defendant is ready to verify, &c.

To declaration by indorsee against the second indorser

And for a further plea in this behalf to the [first] count of the declaration, the defendant says, that after the presentment to and non-payment of the

(y) See Chitty on Bills, 8 edit. 182; Poth. pl. 8; 1 Pardessus, 346, 355. Where the admissibility of a bill of exchange, purporting to be a foreign bill and stamped accordingly, was objected to on its production (under pleas denying the drawing and indorsement), on the ground that though it purported to be drawn abroad, it was in fact an inland bill drawn in London (and therefore requiring a higher stamp), and evidence was offered to prove that fact, it was held that the evidence ought to be received in that stage of the cause and decided upon, instead of receiving it afterwards as part of the defendant's case, and submitting it to the jury; *Bartlett* v. *Smith*, 11 M. & W. 483.

(z) A plea by an indorser of a bill, in an action by the indorsee, that after the indorsement the plaintiff induced and persuaded the acceptor to dishonour the bill, and not pay it when it came to maturity, and that the bill was dishonoured, and thereby the conditional liability of the defendant was converted into an absolute liability, is a bad and non-issuable plea; *Bateson* v. *Lee*, 1 D. & L. 224. And to an action by the indorsee against the drawer of a bill, it was held to be no defence that the plaintiff before the commencement of that suit had consented to a judge's order in an action brought by him against the acceptor, that upon payment of the principal and interest on a certain future day, all further proceedings should be stayed, otherwise judgment; it not appearing that such future day was posterior to that on which judgment could have been obtained in the action against the acceptor; *Kennard* v. *Knott*, 4 M. & G. 474; but see note (*c*), 476, S. C.

The mere forbearance to sue is no discharge of any party collaterally liable as a joint maker of a promissory note; *Clarke* v. *Wilson*, 3 M. & W. 208; see note (*s*), *ante*, 113.

said bill of exchange by the said J. W., as in the said [first] count mentioned, and before the commencement of this suit, to wit, on the —— day of ——, A. D. ——, the plaintiff did, without the knowledge, authority or consent of the defendant, accept, receive and take of and from the said J. S. [*the first indorser,*] a cognovit in a certain action before then commenced by the plaintiff against the said J. S. in her Majesty's Court of Queen's Bench for the recovery of the said sum of money in the said bill of exchange specified; and the plaintiff did in and by such cognovit agree to give and in pursuance of such cognovit did, without the knowledge, authority or consent of the defendant, actually give to the said J. S. much longer time for the payment of the said bill of exchange than the time in which the plaintiff might and would have obtained judgment against the said J. S. in the said action, if the same had been prosecuted with due diligence and without such granting of time as aforesaid. And this the defendant is ready to verify, &c.

Of a bill of exchange, plea that the plaintiff took a cognovit from the first indorser in an action commenced against him for the recovery of the amount of the bill, and thereby gave time to him. (*a*)

And for a further plea in this behalf, as to the first count of the declaration, the defendant says, that he has always been and still is ready to pay the said bill of exchange in the said first count mentioned, on the same being produced and given up to him, [and that the same hath not ever been produced or presented to him for payment thereof. (*c*)] And the defendant further saith, that the plaintiff, after he became the holder of the said bill as aforesaid, to wit, on the —— day of ——, A. D. ——, [*the exact day not material,*] lost the said bill, and thence hitherto hath been and still is unable to produce or find the same, or to give up the same to the defendant on his paying the same. And the said bill, from the time when the plaintiff lost the same, hath not been nor is the same in the possession, custody, power, or control of the plaintiff; and the defendant says, that the said bill, at the

Plea that the bill has been lost since it was indorsed in blank. (*b*)

(*a*) Where the declaration stated that S. drew a bill, payable to his own order, on W., that "the said S." indorsed to the defendant, who indorsed to "the said S.," who indorsed to the plaintiff; and that W. did not pay, of which defendant had notice, and the defendant pleaded that the plaintiffs gave time to "the said S." by taking a cognovit as in the above plea, it was held that upon this declaration it must be intended that the person to whom the defendant indorsed was, and was known by the plaintiff to be, the person who indorsed to the defendant, and that the plea therefore was sufficient, though it did not state in what character S. had been sued by the plaintiff, the action against the defendant being in any case a fraud on the cognovit, for even if S. was sued as an indorser subsequent to the defendant, still the defendant, if the plaintiff now recovered, might sue S.; *Hall* v. *Cole*, 4 A. & E. 577. Where to a declaration by the indorsee of a bill of exchange, alleged to have been indorsed by the drawer to the defendant, by him to W., and by W. to the plaintiff, the defendant pleaded that the bill was indorsed by the defendant to H. for his accommodation, and without consideration; that H. indorsed it to W.; that the alleged indorsement by the defendant to W. in the declaration mentioned, was the said indorsement by the defendant to H. and by him to W., and that after the bill became due and was dishonoured, the plaintiff and H. stated an account respecting this and other dishonoured bills on which H. was liable to the plaintiffs, and agreed to take from B. renewed bills in lieu of them, and not to press any parties for payment of the original bills during the currency of the latter, and averred that the substituted bills were accordingly drawn and accepted and delivered to the plaintiff without the defendant's knowledge or consent, and that the plaintiff gave time thereby to the parties in the original bills; and at the trial the agreement alleged in the plea was proved in substance, but it appeared that H. did not indorse the bill to W.; it was held that this indorsement was a material part of the defence, since unless H. was a party liable on the bill, the agreement between the plaintiff and H. was not such a giving of time as to discharge the defendant, and therefore that the plea was not proved, and the plaintiff was entitled to a verdict; *Lyon* v. *Holt*, 5 M. & W. 250.

(*b*) This plea would be no answer to an action on a promissory note, not made payable to bearer or order, because as that is not an assignable instrument, the maker could not be called upon to pay twice; *Wain* v. *Bailey*, 2 P. & D. 507.

(*c*) *Quære* as to this allegation.

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time when it was so lost as aforesaid, was indorsed in blank and not specially, and was and is transferable by delivery. And this the defendant is ready to verify, &c.

Plea of the statute of limitations in action by the fourth indorsee against first indorser on non-payment by the drawee of a foreign bill of exchange, payable ninety days after sight. (*d*)

And for a further plea in this behalf to the [first] count of the declaration, the defendant says, that before the said bill in that count mentioned had become due, or had been presented for payment, and after the indorsement thereof to the said W. C., and before the indorsement by him to the plaintiff as in that count mentioned, the said bill was presented to the said G. C. for their acceptance, and was refused acceptance; and that the said bill was thereupon, and before the indorsement thereof to the plaintiff, duly protested for non-acceptance, whereof the defendant afterwards, and before the indorsement to the plaintiff, had notice, whereby an action then accrued to the said W. C. to recover the amount of the bill from the defendant. And the defendant further says, that the plaintiff, as well as the said W. C., at the time of the indorsement thereof to the plaintiff, had notice that the said bill had been so presented for and refused acceptance, and protested for non-acceptance. And the defendant further says, that the cause of action in this plea mentioned did not accrue to the said W. C. at any time within six years next before the commencement of this suit. And this the defendant is ready to verify, &c.

Plea that acceptance was obtained by fraud. (*e*)

And for a further plea in this behalf, as to the said first count of the declaration, the defendant says, that his the defendant's acceptance [*or* "indorsement"] of the said bill of exchange in the said first count mentioned, was obtained and procured by the plaintiff and others in collusion with him by fraud, covin and misrepresentation. And this the defendant is ready to verify, &c.

Plea that drawer obtained the defendant's acceptance by fraud and without value, and that plaintiff took the bill with notice thereof. (*f*)

And for a further plea in this behalf, as to the said [first] count of the declaration, the defendant says, that the said acceptance of the said bill of

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(*d*) The holder of a bill of exchange, on non-acceptance and protest and notice thereon, has an immediate right of action against the drawer, and does not acquire a fresh right of action on the non-payment of the bill when due. The statute of limitations, therefore, runs against him from the former and not from the latter period; *Whitehead* v. *Walker*, 9 M. & W. 506; and see *ante*, 126, n. (*i*).

(*e*) *Isaac* v. *Farrer*, 4 Dowl. 750; 1 Tyr. & Gr. 281; *Connop* v. *Holmes*, 4 Dowl. 451; and see a plea of failure of consideration, *Byas* v. *Wylie*, 1 Crom. M. & Ros. 686. The plea in the text was held not to be supported by proof that the note was given for money lent by the plaintiff at twenty per cent. interest, in the name of a joint stock company, fraudulently represented by the plaintiff to have been established for the purpose of lending money at five per cent., and to consist of shareholders, contributors, and borrowers, and to be governed by officers elected by such shareholders, &c., no such company having ever existed, and the two plaintiffs being the only lenders; *Green* v. *Gosden*, 3 M. & G. 446. See plea of fraud by intermediate indorser in an action by the last indorsee, *Daniels* v. *Coombe*, 2 M. & G. 347.

(*f*) To a declaration by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that the drawer fraudulently indorsed to the plaintiff a bill of lading of goods for the defendant, the carrier's signature to which was forged, and also the bill of exchange before acceptance, and on the faith thereof obtained advances from the plaintiff; and that the defendant, on the remittance of the forged bill of lading and of the bill of exchange, accepted the latter in consideration of the former, without notice of the forgery, whereby the consideration for the defendant's acceptance failed; and it was held, that as the plaintiff was indorsee of the bill of exchange for value, and it was not averred that he obtained the acceptance by fraud, or that he knew of the forgery, the failure of consideration between the drawer and the defendant was no defence; *Robinson* v. *Reynolds*, 1 G. & D. 526.

exchange in the said declaration mentioned was obtaine from him the defendant by the said C. S. by fraud, covin and misrepresentation, practised upon him the defendant by the said C. S., and without any value or consideration from the said C. S. to him the defendant for such acceptance thereof, or for his the defendant's paying the amount of the said bill or any part thereof. And the defendant further saith, that the said C. S. indorsed the said bill to the plaintiff, and the plaintiff took and received the said bill from the said C. S., with full knowledge that the said acceptance thereof by the defendant had been obtained by the said C. S. from him the defendant by fraud, covin, and misrepresentation so practised on him by the said C. S. as aforesaid, and without any value or consideration for his the defendant's acceptance thereof as aforesaid. And this the defendant is ready to verify, &c.

See form of plea in *Isaacs* v. *Farrer*, 1 Tyr. & Gr. 281; 4 Dowl. 750; *Connop* v. *Holmes*, 4 Dowl. 451; and a plea of failure in consideration, *Byas* v. *Wylie*, 1 Crom. M. & Ros. 686.

Plea of fraud stated particularly in action by indorsee of a promissory note, and that plaintiff was privy to such fraud.

And for a further plea in this behalf to the [first] count of the declaration, the defendant says, that long before the bill of exchange in that count mentioned became due and payable according to the tenor and effect thereof, the said H. I. B., the drawer of the said bill of exchange, duly indorsed the same to one A. C., who also and long before the said bill of exchange became due indorsed the same to certain persons under the name, style and firm of B. and J., who afterwards, and before it became due and payable, by and under the name, style and firm of B. and J., (*h*) indorsed the same to one C. D., in whose possession the said bill of exchange, at the time it became due and payable according to the tenor and effect thereof, remained and continued, and he the said C. D., when the said bill of exchange became so due and payable as aforesaid, so being the holder thereof as aforesaid, caused the same to be presented to the defendant for payment of the said sum of money mentioned therein, but default being made in payment thereof, the

Plea to declaration by indorsee v. acceptor, that another bill was delivered and accepted in satisfaction by a prior holder, and the bill declared on delivered to plaintiff after it was due. (*g*)

(*g*) *Lewis* v. *Lyster*, 1 Tyr. & Gr. 186. Where to a declaration against the acceptor of a bill of exchange for £16: 12*s.*, drawn by F. and G. and indorsed by them to the plaintiff, the defendant pleaded, first, that after the bill became due, F. and G., being then the holders, applied to the defendant for payment of the bill; that the defendant paid them £7: 2*s.*, which, together with the price of a horse, which the defendant had sold to F. and G., and the price of which, it was agreed between them, should be set off and allowed against the defendants' acceptance, F. and G. accepted in satisfaction and discharge of the bill, and that the bill was not indorsed to the plaintiff until after the said satisfaction and discharge, and after it became due; secondly, that before the bill came into the possession of the plaintiffs, it was indorsed in blank by F. and G. to C. & Co.: and that after it became due, it being then in the hands of C. & Co., F. and G. gave C. & Co. another bill accepted by them for the same amount, which C. & Co. received on account of the first-mentioned bill, and which was paid by F. and G. at maturity; that after the second bill was so given, the defendant paid to F. and G. £7: 2*s.* &c. (as in the first plea); that at the time of the giving of the second bill by F. and G. as aforesaid, and at the time of the said settlement between the defendant and F. and G., the bill in the declaration mentioned remained in the hands of C. & Co., and was not indorsed to the plaintiff until after the giving of the second bill by F. & G., nor until after it became due; the pleas were held bad in substance, because they did not show that the sum paid by the defendant, together with the price of the horse, equalled the amount of the bill of exchange; *Mitchell* v. *Cragg*, 10 M. & W. 367.

(*h*) See *Ball* v. *Gordon*, 9 M. & W. 345; *Tigar* v. *Gordon*, *id.* 347.

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said C. D. afterwards, and before either of the said supposed indorsements in the said first count mentioned, returned the said bill of exchange to the said persons so using the name, style and firm of B. and J. as aforesaid, and the said bill of exchange remained and continued in the possession of those last-mentioned persons, who thenceforth and until and at the time of the discharge and satisfaction of the amount thereof as hereinafter mentioned, continued holders of the said bill, and entitled to receive the said sum of money therein mentioned; that afterwards, and long before the commencement of this suit, and before the supposed indorsement and delivery of the said bill of exchange, either to the said J. A. in the said first count mentioned, or by him the said J. A. to the plaintiff as therein mentioned, he the defendant handed over and delivered to the said persons so using the name, style and firm of B. and J. aforesaid, so being holders of the said bill of exchange as aforesaid, and those last-mentioned persons then accepted and received from the defendant a certain bill of exchange in writing, drawn by the said H. J. B. upon and accepted by the defendant at three months date from the 26th day of May, 1835, for £500 value received, in full satisfaction and discharge of the said sum of money in the said bill of exchange in the said first count mentioned, and all damages by them sustained by reason of the non-payment thereof on the day when the same became due and payable according to the tenor and effect of the said bill of exchange as aforesaid, that afterwards and after the said bill of exchange was handed over and delivered to the said persons so using the name, style and firm of B. and J., to wit, on the day and year last aforesaid, the said persons by and under the name, style and firm of B. and J., indorsed and delivered the said last-mentioned bill of exchange to one F. S., and that afterwards, and after the said bill of exchange became due and payable, to wit, on the day and year aforesaid, the said F. S., then being the holder thereof, and entitled to demand and have and receive the amount thereof, he the defendant paid the said F. S., so being such holder of the said last-mentioned bill of exchange, a certain large sum of money, to wit, the sum of £506: 10*s.* in full satisfaction and discharge of the said sum of money in the last-mentioned bill of exchange specified, and all damages sustained by the plaintiff by reason of the non-payment thereof when the same became due and payable according to the tenor and effect of the said last-mentioned bill of exchange, that the said bill of exchange in the said first count of the said declaration mentioned was not transferred or delivered to the said J. A., or indorsed to or by him, until a long time after the said bill of exchange became due and payable, or until after the said persons so using the name, style and firm of B. and J., and so being holders thereof, when the said bill of exchange in the said first count mentioned became due and payable, and so accepted and received the said bill of exchange for £500, in full discharge and satisfaction of the said bill of exchange in the said first count of the said declaration mentioned, to wit, on, &c. And this the defendant is ready to verify, &c.

Plea to action on a bill, of delivery of a note by a third person in satisfaction. (*i*)

And for a further plea in this behalf to the said —— count, the defendant says, that he accepted the said bill in the said —— count mentioned for the

(*i*) *Sard* v. *Rhodes*, 4 Dowl. 743; *Lewis* v. *Lyster*, 4 Dowl. 377.

accommodation of one J. P., and that there never was any consideration or value for such acceptance or for the defendant's payment of the said bill, or any part of the amount thereof. And the defendant further saith, that after the said bill became due, and before the commencement of this suit, to wit, on &c., the said J. P. made his promissory note in writing, and thereby promised to pay to the plaintiff or order the sum of £44, at a certain time, to wit, six weeks after the date thereof, and then delivered the said note to the plaintiff in full satisfaction and discharge of the said bill and the said cause of action in the said first count mentioned; and the plaintiff then accepted and received the said note in full satisfaction and discharge of the said bill and cause of action in respect thereof. And this the defendant is ready to verify, &c.

Plea to action by the indorsee against the drawer of a bill, that before it became due, the defendant delivered it up to the acceptor discharged and fully satisfied, in consideration of a mortgage executed by the acceptor to the defendant, and that the acceptor indorsed the bill to A. without consideration, and A. indorsed it to the plaintiffs without consideration. (k)

And for a further plea in this behalf, the defendant says, that after the drawing and accepting of the bill of exchange in the declaration mentioned, and before the delivery of the same to the said C. R. [*the acceptor*,] as hereinafter mentioned, and before the same became due and payable, and before the commencement of this suit, and while the defendant, as such drawer as aforesaid, was the holder thereof and entitled to sue upon the same, to wit, on the —— day of ——, A. D. ——, it was agreed between the defendant and the said C. R., that he the said C. R. should execute a certain indenture, and thereby assign, by way of mortgage, certain leasehold premises to the defendant, to secure the payment of a large sum of money, to wit, the sum of £——, part of which, to wit, the sum of £——, was theretofore lent and advanced by the defendant to the said C. R., and for part of which the said C. R., before the said —— day of ——, gave to the defendant certain bills of exchange, drawn by the defendant upon the said C. R. and accepted by him, to wit, four bills of exchange for the sum of £—— each, and each bearing date the —— day of ——, A. D. ——, and each drawn by the defendant upon and accepted by the said C. R., payable to the order of the defendant three months after the date thereof respectively; one of which said bills of exchange was the bill of exchange mentioned in the declaration; and that the defendant should deliver up to the said C. R. the said four bills of exchange, that is to say, three of the said bills of exchange in this plea mentioned, and the said bill of exchange in the declaration mentioned, as discharged and fully satisfied by the said C. R. And the defendant avers, that in pursuance of the said agreement, the said mortgage was executed by the said C. R., and accepted and received by the defendant in discharge and satisfaction of the said four bills of exchange, and thereupon the said bills respectively were given up and delivered to the said C. R. as paid and fully satisfied by him the said C. R. the acceptor thereof, and not for the purpose of being transferred, indorsed, or otherwise negotiated. And the defendant further says, that the said bill in the declaration mentioned was indorsed and delivered by the said C. R. to the said J. S. without any consideration or

(k) The drawer would be liable on the bill to a party to whom the acceptor had indorsed it *for value*, and therefore, to establish the plea, it is necessary to prove the two allegations which put the plaintiff in the same situation with the acceptor, namely, that the latter indorsed to A. and A. to the plaintiff without value or consideration; *Morley* v. *Culverwell*, 7 M. & W. 174, 182.

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value for the same, and without any authority or sanction from the defendant as drawer thereof, and that the said J. S. indorsed and delivered it to the plaintiff without any consideration or value for the same, and the plaintiff now holds the same without having given any consideration or value for the same. And this the defendant is ready to verify, &c.

Plea that acceptor paid the bill when due.(*l*)

The defendant, by ——, his attorney, as to the said [first] count saith, that the defendant [*or if the action be against the drawer or indorser*, "that the said G. H."] did pay the said bill of exchange in the said first count mentioned when the same became due and payable according to the tenor and effect thereof. And this the defendant is ready to verify, &c.

Plea that acceptor paid the bill after it became due.

The defendant, by ——, his attorney, as to the said [first] count saith, that after the said bill of exchange in that count mentioned became due, and before the commencement of this suit, to wit, on &c., the said E. F. paid to the plaintiff, and the plaintiff then accepted and received of and from the said E. F., a large sum, to wit, the sum of £——, in full satisfaction and discharge of the said bill and promise in the said first count mentioned, and of the cause of action of the plaintiff on account and in respect thereof. And this the defendant is ready to verify, &c.

Plea of payment before action. (*m*)

And for a further plea in this behalf, the defendant says, that after the making of the said promises in the declaration [*or* "—— count"] mentioned, and before the commencement of this suit, to wit, on the —— day of ——, A. D. —— [*any day before writ,*] he paid to the plaintiff a large sum of money, to wit, the sum of £——, [*state enough*] in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned, which payment the plaintiff did then accept of and from the defendant in full satisfaction and discharge as aforesaid. And this the defendant is ready to verify, &c.

(*l*) Payment must be pleaded, Reg. Gen. Hil. T. 4 W. 4; *Milligen* v. *Thomas*, 4 Dowl. 373, 488; and when made in satisfaction of a cause of action must conclude with a verification; *Mack* v. *Rust*, 4 Dowl. 206; *Ensall* v. *Smith*, 1 Crom. M. & Ros. 522; 3 Dowl. 193; *Goodchild* v. *Pledge*, 1 M. & W. 363. As to payment of a bill by a stranger, see *Deacon* v. *Stodhart*, 2 M. & G. 317. See plea in action by indorsee against acceptor, that the drawer, as defendant's agent, paid the plaintiff, *Bennison* v. *Thelwall*, 7 M. & W. 512. See also form and requisites of plea of payment of a promissory note by the indorser to the indorsee in an action by the latter against the maker, *Shearn* v. *Burnard*, 10 A. & E. 593; 2 P. & D. 565, S. C.

(*m*) See the notes, *ante*, 97, 98. It is doubtful whether a defendant can plead in bar payment of *part* to an action on a bill or note, but at all events, where the plea is to the whole, he may be allowed in damages such amount as he proves to have been paid; *Lord* v. *Ferrand*, 1 D. & L. 630. See plea to action on a bill of exchange of payment of monies in satisfaction of a bill of exchange, with an averment that the bill in the declaration was the same identical bill mentioned in the plea, *Wheeler* v. *Senior*, 7 M. & W. 562; 9 Dowl. 270, S. C.

VIII. PLEAS IN BAR IN DEBT.

REG. GEN. HIL. T. 4 W. 4.—II. PLEADINGS IN COVENANT AND DEBT.

REG. GEN. HIL. TERM, 4 W. 4.

1. In debt on specialty or covenant the plea of "*non est factum*" shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable.

2. The plea of "*nil debet*" shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead "*that he never was indebted in manner and form as in the declaration alleged,*" and such plea shall have the same operation as the plea of *non-assumpsit* in *indebitatus assumpsit;* and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

I. PLEAS TO DEBT ON SIMPLE CONTRACT.

PLEAS TO DEBT ON SIMPLE CONTRACT.

In the ——

The —— day of ——-, A.D. ——.

That defendant never was indebted. (a)

D. ats. B. } The defendant, by ——, his attorney, [*or* "in person,"] *saith, that he never was indebted* in manner and form as is in the said declaration [*or* "—— count"] alleged. And of this the defendant puts himself upon the country, &c.

The like as to a part of the sum demanded and commencement of plea to the residue.

And the defendant, by ——, his attorney, as to the said —— count, [*or* "as to the sum of £——, parcel of the said sum above-mentioned,"] saith, that he never was indebted in manner and form as the plaintiff hath above in that behalf alleged. And of this he puts himself upon the country, &c.

(a) The Reg. Gen. Hil. T. 4 W. 4, prohibits the plea of *nil debet*, or "that the defendant *doth not owe*," and directs the plea to debt on simple contract to be *nunquam indebitatus* as above. A plea that "*defendant never owed*," instead of "*never was indebted*," is bad on special demurrer, but leave to amend was given; *Smedly* v. *Joyce*, 1 Tyr. & Gr. 84; 2 Crom. M. & Ros. 721. Non-assumpsit to debt on simple contract would be such a nullity that plaintiff might sign judgment; *Perry* v. *Fisher*, 6 East, 549; *Brennan* v. *Egan*, 4 Taunt. 164; *Aaron* v. *Chaundy*, 2 Bar. & Cres. 562; 4 Dowl. & Ryl. 41. The rules of Pleading, Hil. T. 4 W. 4, do not apply to penal statutes, the plea of *nil debet* may in such cases be still used; *Earl Spencer* v. *Swannell*, 3 M. & W. 154; see also *Calvert* v. *Moggs*, 2 P. & D. 543, and *post*, "*Pleas to Debt on Penal Statutes*."

On Simple Contract.

And as to the residue of the said money in the said declaration mentioned, the defendant saith, that &c. [*Then state the defence to the residue.*]

Plea of *ne unques indebitatus* by an executor or administrator.

And the defendant, by ——, his attorney, saith, the said G. H. deceased, never was indebted as in the declaration alleged. And of this he puts himself upon the country, &c.

Plea of fraud to debt on simple contract. (*b*)

And for a furthur plea in this behalf, the defendant saith, that the plaintiff heretofore, to wit, on &c. caused and procured and induced the defendant to make and enter into the said alleged contracts, and to contract the said alleged debts, through and by means of the fraud, covin and misrepresentation of the plaintiff and others in collusion with him. And this the defendant is ready to verify, &c.

Tender to debt on simple contract. (*c*)

Never indebted except as to £—— parcel &c.

Tender of that sum.

D. ats. B. } The defendant, by E. F. his attorney, as to the said several sums of money in the said declaration mentioned and thereby demanded, except as to the sum of £——, [*the sum tendered*] parcel thereof, says, that he never was indebted in manner and form as in the said declaration is alleged; and of this he puts himself upon the country &c. And as to the said sum of £—— parcel of the said several sums of money in the said declaration mentioned, the defendant says, that the plaintiff ought not to have or maintain his aforesaid action thereof against him to recover any damages by reason of the nonpayment of the said sum of £—— parcel &c. because he says, that he, the defendant, at the time when the said sum of £—— parcel &c. became due and payable, was, and from thence hitherto hath been, and still is, ready to pay to the plaintiff the said sum of £—— parcel &c., and that after the time when the said sum of £—— parcel &c. became due and payable, and before the commencement of this suit, to wit, on &c. [*day of tender, or about it,*] he, the defendant, was ready and willing to pay, and then tendered and offered to the plaintiff to pay him the said sum of £—— parcel &c., to receive which of the defendant the plaintiff then wholly refused, and the defendant now brings the said sum of £—— so tendered into Court here, ready to be paid to the plaintiff if he will accept the same. (*d*) And this he is ready to verify; wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him, to recover any damages by reason of the nonpayment of the said sum of £—— parcel &c.

Infancy, to debt on simple contract. (*e*)

And for a further plea in this behalf, the defendant says, that at the time of the making of the said alleged contracts in the said declaration mentioned, and each and every of them, he was an infant within the age of twenty-one

(*b*) See the plea in debt on specialty and notes, *post*, 173.

(*c*) A tender must be pleaded. See the notes, and a form in assumpsit, *ante*, 90, and the form in debt, 2 Rich. C. P. 42. As to the form of this plea in debt, see 1 Saund. 33, n. 2; Com. Dig. Pleader, 2 W. 28; *Willis* v. *Prudht*, 7 Dowl. 460; and the forms indexed in 7 Wentw. 576, 577, 578. Upon a bare covenant for payment of money, a tender may be always pleaded; 7 Taunt. 486.

(*d*) See *ante*, 91, if money has been paid into Court.

(*e*) See *post*, 177, note, and the forms, Rast. Ent. 163 a; Co. Ent. 125 b; Bro. Red. 300; 7 Wentw. Index, 577, 578. In debt on simple contract, before Reg. Gen. Hil. T. 4 W. 4, it was considered that infancy might be given in evidence under the general issue *nil debet*, but now it must *be pleaded* according to those rules.

years, to wit, of the age of —— years. (*f*) And this the defendant is ready to verify, &c.

Coverture, to debt on simple contract. (*g*)

And the defendant in person says, that at the time of the making of the said alleged contracts, and of the accruing of the causes of action in the declaration mentioned, and each and every of them, was and still is the wife of one E. F. And this the defendant is ready to verify, &c.

Bankruptcy of defendant. (*h*)

And for a further plea in this behalf, the defendant says, that after the said debts in the declaration mentioned were contracted, and before the commencement of this suit, to wit, on &c. [*the date of defendant's certificate,*] he, the defendant, became a bankrupt, within the true intent and meaning of the statutes in force concerning bankrupts, and that the said debts were contracted, and the said causes of action in the said declaration mentioned, and each of them, did accrue to the plaintiff, before he, the defendant, so became a bankrupt as aforesaid. (*i*) And of this the defendant puts himself upon the country, &c. (*k*)

Judgment recovered in debt. (*l*)

The judgment in this plea mentioned was signed on &c. A. D. ——, and the number of the roll is ——. (*l*)

And for a further plea in this behalf, the defendant says, that the plaintiffs heretofore, to wit, on &c. in the Court of our said lady the queen, before the queen herself, [*or if in C. P.* "before Sir N. C. Tindal, knight, and his companions, her majesty's justices of the bench,"] at Westminster, in the county of Middlesex, impleaded the defendant in a certain plea of debt, for the detaining and not paying the very same identical debt, and for and in respect of the same identical cause of action, in the said declaration mentioned, and such proceedings were thereupon had in that suit in that Court, that afterwards, to wit, in that same term, the plaintiffs, by the consideration and judgment of the said Court, recovered in the said plea against the defendant the same identical debt of £500 [*the amount at the commencement,*] in the said declaration mentioned, as also 1*s.* for their damages by them sustained as well by the detention thereof as for their costs and charges by them about their suit in that behalf expended, whereof the defendant was convicted, as by the record and proceedings thereof still remaining in the said Court of our said lady the queen, at Westminster aforesaid, more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. And this the defendant is ready to verify by the said record.

(*f*) The precise age here stated is not material.

(*g*) See the notes to the form, *ante*, 33, Com. Dig. Plead. 2 W. 21. If the defendant be *still* a feme covert, she must plead in person, and not by attorney; *ante*, 33, note. (*k*). Coverture might, before Reg. Gen. Hil. T. 4 W. 4, be either pleaded specially, or be given in evidence under the general issue *nil debet* or *non est factum*: 3 Burr. 805; 12 Mod. 191; 2 Stra. 1104; Com. Dig. Pleader, 2 W. 18. But *since* those rules coverture *must* be pleaded.

(*h*) This defence must be pleaded; 1 Campb. 363; 12 East, 664. The defendant may also plead the general issue and any other plea. This plea is given by the 6 G. 4, c. 16, s. 126, see the notes, *ante*, 77, which will be here applicable. As to when defendant must plead more specially, see *id.* The plea must pursue the terms of the statute; *Sheen* v. *Garrett*, 6 Bing. 686. See form of plea of defendant's bankruptcy to debt on bond, 2 B. & Ald. 803.

(*i*) This allegation is necessary; 4 T. R. 156; *ante*, 77, note (*n*).

(*k*) The plea is to conclude to the country; 1 P. Wms. 258, 259; 10 Mod. 160, 247; 6 Bing. 686; *ante*, 77.

(*l*) See Reg. Hil. T. 4 W. 4, r. 8, and notes, *ante*, 107, 109.

On Simple Contract.

Plea of accord and satisfaction in debt. (*m*)

And for a further plea in this behalf, the defendant says, that after the making of the said contracts in the said declaration mentioned, and before the commencement of this suit, to wit, on &c. he delivered to the plaintiff certain goods and chattels, to wit, on &c. [*here describe the chattels delivered* "in satisfaction of the said debt," *or* "cause of action,"] of great value, to wit, of the value of £—— (*n*) in full value, satisfaction, and discharge of the said contract, [*or* "debts," *or* "causes of action,"] in the said declaration mentioned, and of all the damages by the plaintiff sustained by reason of the detention thereof. And the plaintiff then accepted and received the said goods and chattels in full satisfaction and discharge of the same contracts, [*or* "debts," *or* "causes of action."] And this the defendant is ready to verify, &c.

Plea of *release* to debt on simple contract or on a deed. (*o*)

And for a further plea in this behalf, the defendant saith, that after the contracting of the said debt, [*or* "after the making of the said writing obligatory," *or* "indenture," &c.] and before the commencement of this suit, to wit, on &c. the plaintiff by his certain deed, sealed with his seal, and now shown to the said Court here, released and discharged the defendant of and from the said debt, [*or* "writing obligatory," *or* "indenture,"] and all actions, claims and demands in respect thereof. And this the defendant is ready to verify, &c.

Actio non accrevit infra sex annos. (*p*)

And for a further plea the defendant saith, that the said several supposed causes of action in the said declaration mentioned did not nor did any or either of them accrue to the plaintiff at any time within six years next before the commencement of this suit, wherefore the defendant prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him the said defendant.

Set-off to debt on a deed or simple contract. (*q*)

Conclusion.

And for a further plea in this behalf, the defendant says, that the plaintiff before and at the time of the commencement of the suit was, and from thence hitherto hath been and still is, indebted to the defendant in the sum of £—— [*state enough*] for &c. [*Here state the subject-matter of the set-off as in assumpsit, ante, 114, 115, &c.*] Which said sum of money, so due and owing from the plaintiff to the defendant, exceeds the supposed debt due and owing from the defendant to the plaintiff, and the damages sustained by the plaintiff, by reason of the detention of the said supposed debt, so alleged to be due and owing to the plaintiff as in the said declaration mentioned, and out of which said sum of money, so due and owing from the plaintiff to the defendant, he the defendant is ready and willing and hereby offers to set off and allow to the plaintiff the full amount of the said supposed debt and

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(*m*) The delivery and acceptance of bills of exchange on account cannot be pleaded to an action on a bond or other specialty; *Worthington* v. *Wigley*, 3 Bing. N. C. 454; 5 Dowl. 504, S. C.

(*n*) The value is immaterial.

(*o*) To a plea of release of one of several *joint* obligors, a replication that it was agreed that the others should not be discharged, is bad; *Cocks* v. *Nash*, 9 Bing. 342; 2 Moore & Scott, 435; see form and note in assumpsit, *ante*, 112.

(*p*) See the notes to the form, *ante*, 126, which will, for the most part, apply here. The statute must be pleaded, *semble*; 1 Saund. 283; 2 Saund. 626, n. 6; *ante*, vol. i. Index, "*Statute of Limitations.*"

(*q*) As to the plea of set-off in general, see *ante*, 114, 115. To debt on a bond, with a penalty, the plea is more special, see form, *post*, 181, and notes.

damages, according to the form of the statute in such case made and provided. And this he, the defendant, is ready to verify, &c.

On Simple Contract.

See form prescribed by Reg. Gen. T. 1 Vict. *ante*, 104.

Plea of payment of money into Court in debt. (r)

The forms of the pleas of plene administravit, of retainer, &c. in assumpsit, together with the notes, *ante*, 130, 131, will be here applicable, see forms, *post*, to actions on bonds; and see also Com. Dig. Pleader, 2 D. 9. To debt on simple contract, or on bond or other specialty, these general pleas are sufficient, but it has been decided, that to debt upon a record it must be shown in the plea how the defendant administered, &c.; see 1 Ld. Raym. 3; Aleyn, 48, *sed quære*. In a plea of plene administravit præter, say "whereby he could or might pay or satisfy the debt aforesaid, or any part thereof. And this the defendant is ready to verify, &c." See forms, 5 Wentw. 387; 7 Wentw. 362, 460.

By and against executors and administrators.

II. ON SPECIALTIES.

On Specialties.

In the ——

The —— day of ——, A. D. ——.

D. ats. B. } The defendant, by ——, his attorney, says, that the said alleged (*t*) writing obligatory, [*or* "indenture," *or* "articles of agreement," (*u*)] in the declaration mentioned, is not his deed. And of this he puts himself upon the country, &c.

Plea of *non est factum* to debt on bond, or indenture, or articles under seal. (*s*)

(r) A difficulty occurs in an action of debt on a bill of exchange or promissory note in pleading payment of a sum of money into Court in the form prescribed by the rule Trin. T. 1 Vic., as that form concludes with an averment that the defendant "is not *indebted* in a greater amount, &c.," and a plea of never indebted is improper to a count on a bill or note; *Finleyson* v. *M'Kenzie*, 6 Dowl. 71; 3 Bing. N. C. 824, S. C. The mode of obviating this difficulty is pointed out by Parke, B. in *Armfield* v. *Burgin*, 6 M. & W. 284. Where a sum of money is paid into Court less than the amount of the bill, the defendant should show some answer as to part (as part payment, or failure of consideration as to part), and plead the payment into Court as to the residue; but see *Lord* v. *Ferrand*, 1 D. & L. 631, where it was doubted whether payment of part of the amount of a bill of exchange or promissory note can be pleaded in bar.

The statutory form of plea appears to have been framed with a view to the action of assumpsit, for, as in an action of debt a plaintiff is entitled to some damages, it seems an omission not to plead to the damages as well as the debt. The Courts do not, however, encourage a departure from the prescribed form; and where to an action of debt the defendant pleaded as to £21 : 9*s*. payment into Court, and "that he never was indebted to the plaintiffs to a greater amount than £21 : 9*s*. in respect of the said sum, parcel &c., and that the plaintiffs have not sustained damage by reason of the detention thereof to a greater amount than the sum of sixpence," without alleging that the defendant brought the damages into Court, the plea was held bad on special demurrer; *Bailey* v. *Sweeting*, 1 D. & L. 654.

Payment into Court cannot be pleaded under 4 & 5 Anne, c. 16, to an action on a bond; *England* v. *Watson*, 9 M. & W. 338; 1 Dowl. N. S. 398, S. C.; see *post*, "*Pleas of Payment to Actions on Bonds.*"

(*s*) See form, 1 Rich. C. P. 146. When this plea is necessary or proper, see *ante*, vol. i. Index, "*Debt (pleas in)*;" Tidd's Prac. 9th edit. 643, 655; 2 Ld. Raym. 1500; Com. Dig. Pleader, 2 W. 18. This plea is good in cases where the deed was not executed, or *varies* from the declaration; Com. Dig. Pleader, 2 W. 18; and see 6 Taunt. 394; 2 Marsh. 96, S. C.; 4 M. & Sel. 470. And a material qualification of a covenant in the deed, not noticed in the declaration, may be taken advantage of under this plea; 11 East,

On Specialties.

The like by an executor or administrator. (*v*)

D. ats. B. } The defendant, executor, ["*or* administrator,"] as aforesaid, by E. F. his attorney, says, that the said supposed writing obligatory [*or* "indenture," *or* "articles of agreement,"] was not nor is the deed of the said G. H. deceased. And of this he puts himself upon the country, &c.

Non est factum, after craving oyer of bond and condition. (*x*)

D. ats. B. } The defendant, by E. F. his attorney, craves oyer of the said *supposed* (*y*) writing obligatory, in the said declaration mentioned, and it is read to him (*z*) &c. he also craves oyer of the condition (*a*) of the said supposed writing obligatory, and it is read to him in these words, "Whereas," &c. [*here set forth the recitals, if any, and the condition verbatim,*] (*b*) which being read and heard, the defendant saith, that the said (*c*) supposed writing obligatory is not his deed. And of this he puts himself upon the country, &c.

The like of an indenture.

D. ats. B. } The defendant, by E. F. his attorney, craves oyer of the said supposed (*d*) indenture in the said declaration mentioned, and it is read to him in these words, "This indenture &c." [*here set out*

663, 641, 642; but the defendant having had oyer of a deed cannot, in a plea of *non est factum*, take advantage of a variance between the deed itself and that set out in the declaration, but must set it out on oyer and demur, 9 Dowl. 162; *ante*, vol. i. p. 450. In debt on bond against an incorporated company, where it is shown that the bond has been sealed with the seal of the company by the proper officer, it is competent to the defendants under the plea of *non est factum* to prove that several of the requisitions of the act, necessary to the validity of the execution, have not been complied with; *Hill* v. *M. & S. Waterworks Company*, 2 Nev. & M. 57; 5 B. & Adol. 866.

(*t*) When the defendant means to dispute the validity of the deed, it should seem that the plea should refer to it merely by the term "*writing*," or "*supposed* writing obligatory," "indenture," &c. and should not say, "writing obligatory," &c. generally, because such admission would be inconsistent with the proposed defence; 1 Saund. 291 a, n. 1; see the precedents, Lil. Ent. 166; Co. Ent. 145 b; Rast. Ent. 181 b, 182 a; 10 Co. 126 b; Lutw. 464, 467, which say only "*writing*."

(*u*) The description of the instrument in the plea should correspond with the terms employed in the declaration; and where to a declaration on an instrument described throughout as a "deed," and "deed of apprenticeship," the defendant pleaded that the said "indenture" was not his deed, it was held that a special demurrer to such plea was not frivolous; *Bird* v. *Holman*, 9 M. & W. 761; 2 Dowl. N. S. 234, S. C.

(*v*) As to this plea, see Com. Dig. Pleader, 2 W. 3; 10 Co. 120; see form, 1 Rich. C. P. 146.

(*x*) It is not usual to plead *non est factum*, setting out the condition on oyer, unless where the defendant pleads double. If the defendant be desirous of taking advantage of a variance in the deed as stated in the declaration, he should crave oyer, set it out, and demur; see the judgment of Patteson, J., in the case of *Smith* v. *Jennings*, 9 Dowl. 16, and the notes, *ante*, vol. i. p. 450.

(*y*) See *supra*, note (*t*).

(*z*) Though it is usual in practice not to set forth the bond, but to say, "and it is read to him," &c. and then to pray oyer of the condition, and set it forth in *hæc verba*, yet it is said that regularly the bond ought to be entered at large as well as the condition, but if no use is intended to be made of the bond in pleading, there is no occasion to crave oyer of it at all, or to enter any such prayer, for it is sufficient to pray oyer of the condition only; 1 Saund. 9 b, note 1.

(*a*) Oyer must be demanded of the condition, to entitle the defendant to it; 1 Saund. 290, note 2.

(*b*) The whole condition or deed must be set forth upon oyer, and if there be any misrecital, the plaintiff may either sign judgment as for want of a plea, or he may, by his replication, pray that the deed may be enrolled, and procure it to be enrolled, and demur; 1 Saund. 9 b, n. 1; 4 T. R. 370; Tidd, 9th edit. 565, 589. The Reg. Gen. Hil. T. 2 W. 4, reg. 44, orders that if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer book, may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer.

(*c*) This refers to the bond or deed as set out on oyer, and not to the bond or deed set out in the declaration; 4 B. & Cres. 741; 7 D. & R. 249, S. C.; see *supra*, n. (*a*).

(*d*) See *supra*, n. (*u*).

the indenture verbatim,] which being read and heard, the defendant saith, that the said supposed indenture is not his deed. And of this he puts himself upon the country, &c.

Plea, *denial of excuses* for omissions of profert of deed to a declaration on a deed stating it to be in possession of defendant, *denying that it is so.* (*e*)

And for a further plea in this behalf, the defendant says, that the said supposed indenture in the said declaration mentioned was not in the possession of the defendant in manner and form as the plaintiff hath in his said declaration above alleged. And of this the defendant puts himself upon the country, &c.

To debt on bond conditioned to pay money on demand, plea that no demand was made.

See *Thorn* v. *Jenkins*, 1 D. & L. 604.

Delivery of the bond as an *escrow.* (*f*)

And for a further plea in this behalf, the defendant says, that the said writing in the said declaration mentioned was made by the defendant on &c. aforesaid, to secure the repayment of a certain sum of money then lent by the plaintiff to one E. F. and delivered by the defendant to one G. H. (*g*) as an escrow to be kept by him on this special condition, that is to say, that (*h*) [if the said E. F. should, within the space of —— months then next following, secure the repayment of the said sum of money to the plaintiff, by a mortgage upon certain freehold premises of the said E. F. situate at &c. that then and in that case the said writing obligatory should be immediately discharged, annulled and held for nothing, and returned and redelivered to the defendant; but that in default of the said E. F. so securing the repayment of the said sum of money to the plaintiff by such mortgage as aforesaid within the aforesaid time, then the said writing obligatory of the defendant should stand and be against him in full force]; and the defendant further says, that within the space of —— months from the time of the making and delivering of the said writing as an escrow to the said G. H. as aforesaid, for the purpose aforesaid, to wit, on the —— day of ——, A.D. ——, the said E. F. did secure the repayment of the said sum of money to the plaintiff, by a mortgage upon the said freehold premises of him the said E. F., which said mortgage the plaintiff then accepted and received as a security for the repayment of the said sum of money so by him lent to the said E. F. as aforesaid; whereby the said writing of the defendant so delivered to the

(*e*) As to profers, see *ante*, vol. i. A plea which only states that the deed "*is* not in the possession of the defendant *modo et formâ*," is bad; *Fisher* v. *Ford*, 4 P. & D. 347.

(*f*) As to this plea in general, see Com. Dig. Pleader, 2 W. 18, and Fait, A. 3; 4 East, 94, 95; 3 Salk. 120. Plaintiff's possession of a deed in his favour is *primâ facie* evidence of its not having been delivered as an escrow; *Hare* v. *Horton*, 5 B. & Adol. 715. Delivery as an escrow might formerly be given in evidence under the plea of *non est factum*; 4 Esp. Rep. 255; 2 Rol. Abr. 683, l. 5; Sir T. Raym. 197. See forms in 7 Wentw. Index, 591, 595, 596; Rast. Ent. 181 b, 182 a; Lil. Ent. 186; 2 Rich. C. P. 39. It is said that as this plea in effect denies the allegation that the defendant made his deed, the plea should conclude to the country, 1 Salk. 274; Lord Raym. 803; and so do many of the precedents, Rast. Ent. 181 b, 182 a; Co. Ent. 145 b; and see the precedents in Lil. Ent. 186; 2 Rich. C. P. 39. But *quære*, if it amounts to a traverse of making the deed, whether the defendant should not plead *non est factum*. The deed of a corporation needs no delivery; 9 East, 360. As to what is an escrow, see 4 B. & A. 440; 2 B. & C. 85.

(*g*) The plea must, it seems, state *to whom* the bond was delivered; 5 Bac. Abr. 160, Obligation, C. It is no escrow if delivered to the *obligee*; *semb. id.*; Hob. 246; Vent. 9; and see *Hare* v. *Horton*, 5 B. & Adol. 715.

(*h*) The following statement must necessarily be according to the facts of each particular case.

ON SPECIALTIES.

said G. H. became and was wholly discharged, annulled and vacated; and so the defendant saith that the said writing is not his deed. And of this he puts himself upon the country, &c. (*i*)

FRAUD.

1. FRAUD.

Deed obtained by fraud, showing the particulars, (*k*)

And for a further plea in this behalf, the defendant saith, that the said alleged writing obligatory [*or* "indenture,"] in the said declaration mentioned, was obtained from the defendant by the plaintiff (and others in collusion with him) by fraud, covin and misrepresentation. And this the defendant is ready to verify, &c.

DURESS.

2. DURESS. (*l*)

Menace to kill.

And for a further plea in this behalf, the defendant says, that the plaintiff, just before the making of the said writing in the said declaration mentioned, to wit, on &c. menaced and threatened the life of the defendant, unless the defendant would make and seal, and as his act and deed deliver, the said writing [*or* "indenture," *or* "articles,"] in the said declaration mentioned; and the defendant did thereupon then, by reason and in consequence of such menaces and threats, and in fear and apprehension thereof, make and seal, and as his act and deed deliver, the said writing. And this the defendant is ready to verify, &c.

Battery and menace of further battery, &c.

And for a further plea in this behalf, the defendant saith, that the plaintiff, just before the making of the said writing in the said declaration mentioned, to wit, on &c. assaulted, beat, bruised and wounded the defendant, and then menaced and threatened further to beat, bruise and wound him, unless he would make and seal, and as his act and deed deliver, the said

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(*i*) As to the conclusion, see preceding page, n. (*f*); and Rast. Ent. 181 b, 182 a; Co. Ent. 145 b; 2 Rich. C. P. 39; Lord Raym. 803; 5 Bac. Abr. 160, Obligaion, C. See other forms, *post*, and Petersdorff, 124.

(*k*) Fraud is a defence at law, 2 T. R. 765; 3 T. R. 48; but not when both parties are implicated, 2 B. & Ald. 370; and the fraud must be in the concoction or execution of the bond itself; *semble sed quære*, 2 Crom. M. & Ros. 720, note (*a*), and 6 Car. & P. 511. This general plea suffices; 2 M. & Sel. 378; 9 Co. 110. It was supposed that fraud might have been given in evidence under the general issue, and that so might any thing that avoided the deed at common law *ab initio*, 5 Co. 119; 2 Wils. 341, 347; but fraud must clearly now be pleaded, *ante*, vol. i.; *Edwards* v. *Brown*, 1 Tyrw. Rep. 196; see 2 Stark. 35; 2 Chit. Rep. 334. See general plea of fraud and covin to action on bond, not stating particulars; *Spencer* v. *Handley*, 4 M. & G. 414, 420. To debt against a railway company on covenant, for 5000*l.* as a compensation for damage to the plaintiff's estate by a railway, on his withdrawing his opposition to the bill then in parliament for its formation, a plea that the agreement was made secretly without the knowledge of those through whose lands the line was to pass, or of the legislature, and that the plaintiff was a peer of parliament, was held bad in the Exchequer Chamber, because the plea did not distinctly show that the parties at the time of the contract meant it to be concealed, and that the agreement was not bad on the ground of the plaintiff being a peer, since it was not shown that the money was promised as a consideration for his vote being given or withheld, and he had a right in his individual character to bargain for compensation for injury to his land, but that if it had appeared that the money was so promised, the action must have failed; *Howden* v. *Simpson*, 10 A. & E. 793; 2 P. & D. 731, S. C., reversing the judgment of the Court of Queen's Bench, 2 P. & D. 717.

(*l*) See Com. Dig. Pleader, 2 W. 19; Chit. jun. Contr. 54. The duress must be of the person and not of *goods*, to avoid a deed or agreement; *Skeate* v. *Beale*, 11 A. & E. 983; 3 P. & D. 597, S. C.

writing in the said declaration mentioned; and the defendant did thereupon then, for and through fear and apprehension of losing his life, on that occasion make and seal, and as his act and deed deliver, the same writing. And this the defendant is ready to verify, &c. DURESS.

And for a further plea in this behalf, the defendant says, that the plaintiff, just before the making of the said writing in the said declaration mentioned, to wit, on &c. assaulted, beat, bruised and wounded the defendant, and also then menaced and threatened further to beat, bruise and wound the defendant, unless he would make and seal, and as his act and deed deliver, the said writing in the said declaration mentioned; and the defendant did then by reason and in consequence of the premises in this plea mentioned, and for fear of further wounding and of mayhem, and on no other account whatsoever, make and seal, and as his act and deed deliver, the said writing. And this the defendant is ready to verify, &c. Battery, and fear of mayhem.

And for a further plea in this behalf, the defendant says, that he the defendant, at the time of making of the said writing, to wit, on the said —— day of ——, A.D. ——, aforesaid, was unlawfully imprisoned by the plaintiff (and others in collusion with him), and then detained in prison, until by the force and duress of such imprisonment of him the defendant, he made the said writing, and delivered the same to the plaintiff as his deed. And this the defendant is ready to verify, &c. Duress of imprisonment. (m)

3. INFANCY. INFANCY.

D. ats. B. } And the defendant, by ——, his attorney, saith, that he the defendant, at the time of the making of the said writing, was an infant within the age of twenty-one years, to wit, of the age of —— (o) years. And this the defendant is ready to verify, &c. Infancy to debt on bond or deed. (n)

4. COVERTURE. COVERTURE.

D. ats. B. } And the defendant in person saith, that at the time of the making of the said writing she was and still is the wife of one E. F. And this she is ready to verify, &c. Coverture to debt on bond or deed. (p)

(m) The imprisonment must have been unlawful, or it would be no duress; 2 Inst. 482. In equity, see 1 Atk. 409.

(n) See the forms, Rast. Ent. 163 a; Bro. Red. 176; Morg. 534; Plead. A. 452; 1 Rich. C. P. 154. If the defendant be *still* an infant, he must plead by guardian, and not by attorney. In an action upon a deed infancy must always have been pleaded specially; 3 Burr. 1805; Com. Dig. Pleader, 2 W. 22; 5 Co. 119 a; Gilb. Debt, 437; 2 Salk. 675; 1 Ld. Raym. 315, S. C.; *sed vide* 1 Salk. 279; 3 Burr. 1794; 3 Taunt. 307; 3 M. & Sel. 477; 2 Hen. Bla. 515; 2 Stark. 36; 6 Moore, 488; Tidd's Prac. 9th edit. 650, 651; and now by Reg. Gen. Hil. T. 4 W. 4, infancy must be pleaded specially in *debt* on simple contract or legal liability, as well as in assumpsit. See form of plea to debt on simple contract, *ante*, 170.

Lunacy may be given in evidence under *non est factum*; 2 Stra. 1104; *sed vide* 2 Salk. 675.

(o) The precise age here stated is not material.

(p) See the notes to the precedent, *ante*, 171. Com. Dig. Pleader, 2 W. 21, and pre-

ILLEGALITY.

5. ILLEGALITY.

Observations on Pleas of Illegality in general.]—Since the Reg. Gen. Hil. T. 4 W. 4, *illegality* in the consideration or the contract, whether at common law or declared illegal by statute, *must be pleaded.* The several forms in assumpsit may be readily adapted to the action of debt or covenant.

GAMING.

6. GAMING.

Plea to debt on an account stated, that it was stated respecting money won by plaintiff of defendant at gaming, to wit, playing at whist. (*q*)

And for a further plea in this behalf, as to the said [last] count of the said declaration, so far as it relates to the defendant's being indebted to the plaintiff for money found due to the plaintiff on an account stated between them, the defendant says, that before the said stating of the said account, to wit, on the —— day &c. the defendant did, at one meeting, by then playing for money at a certain game at cards, called *whist*, other than with or for ready money, lose to the plaintiff in money so played for a large sum exceeding the sum of 100*l.* to wit, the sum of £——, upon ticket and credit, and did not pay down the same at the time of the said loss, *contrary to the form of the statute in that case made and provided.* And the defendant avers that the same remaining due and unpaid, to wit, on the day and year in the said last count of the said declaration mentioned, an account was stated between the plaintiff and the defendant of and concerning the same, and the defendant was then found indebted to the plaintiff in a large sum, to wit, £——, for and in respect of the said sum so lost as aforesaid. And the defendant avers that the said account stated in the said declaration and in this plea mentioned was and is the same statement of account, *and not other or different statements of account*, and that the money in the said declaration alleged to have been found to be due from the defendant to the plaintiff on the account stated was and is the same identical sum in this plea alleged to have been lost by the defendant as aforesaid, and not other or different money. *And that upon the said statement of the said account, the defendant was not found to be indebted to the plaintiff in any other sum of money whatever than the said sum so lost as aforesaid.* And this the defendant is ready to verify, &c.

STOCK-JOBBING.

7. STOCK-JOBBING.

That bond was given for settling differences.

And for a further plea in this behalf, the defendant saith, that before the making of the said writing in the said declaration mentioned, and after

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cedent of plea of coverture to debt on simple contract. If the defendant be *still* a feme covert, she must plead in person, and not by attorney, *ante*, 171. Coverture at the time of the executing the deed might be either pleaded specially, or be given in evidence under the general issue *non est factum*, 3 Burr. 1805; 12 Mod. 101; 2 Stra. 1104; Com. Dig. Pleader, 2 W. 18; 2 Campb. 272; but now it *must* be pleaded, Reg. Gen. Hil. T. 4 W. 4.

(*q*) 16 Car. 2, c. 7, whereby all contracts for the payment of losses at cards, &c. at one time or meeting exceeding 100*l.* are made void. This stat. applies also to securities for losses exceeding 100*l.* though not if for money lent, as is the case in stat. Ann.

the making of a certain act of parliament, passed in the parliament of our late sovereign lord George the Second, in the 7th year of his reign, intituled, "An Act to prevent the Infamous Practice of Stock-Jobbing," and after the 1st day of June, A.D. 1734, to wit, on the —— day of ——, in the year of our Lord ——, the plaintiff had, for and on the behalf of the defendant, contracted and agreed to purchase of and from one J. L. certain public stock, to wit, [£4000] three per cent. consols, as if and under colour and pretence that the same was to be and should be transferred to the defendant on the [12th] day of April, A.D. [1830], as aforesaid. And thereupon afterwards, to wit, on the day and year last aforesaid, the plaintiff did, for and on the behalf of the defendant, voluntarily pay a certain sum of money, to wit, the sum of [£80], to the said J. L. for the compounding, satisfying and making up a certain difference, to wit, the difference between the sum of the said stock, when the same was so agreed to be purchased as aforesaid, and the price and value thereof on the said [12th] day of [April], in the year last aforesaid, for his the defendant's not receiving the public stock, and for not performing the said contract and agreement with the said J. L. by the plaintiff so stipulated and agreed for and on the behalf of the defendant to be performed as aforesaid, the said stock then not being any public or joint stock, or other security bought by the plaintiff or the defendant, or any other person or persons, to be delivered, accepted and paid for on a future day, and which had been or was refused or neglected to be transferred, and the said difference or sum of [£80], then not being recovered or received by the said J. L. of or from the plaintiff or the defendant, or any other person or persons, being the person or persons who first contracted to sell or deliver such public or joint stock or other public security, as the damage which had been sustained by reason of the not delivering or not transferring such stock or other securities by the defendant, or any other person or persons; contrary to the statute in such case made and provided. And the defendant further says, that in consideration of the premises, and for the purpose (amongst other things) of securing to the plaintiff the repayment of the said sum of [£80], so by him given and paid to the said J. L. as aforesaid, for and on behalf of the defendant, for the compounding, satisfying and making up of the said difference, the defendant, on the said —— day of ——, A.D. ——, made and sealed, and as his act and deed delivered to the plaintiff, the said writing in the said declaration mentioned, and the plaintiff then accepted and received the said writing of and from the defendant upon and for the considerations and for the purpose aforesaid; contrary to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

Stock-Jobbing against provisions in Stock-jobbing Act, 7 Geo. 2, c. 8. (r)

And for a further plea in this behalf, the defendant saith, that before the making of the said writing in the said declaration mentioned, to wit, on

Another plea.

(r) See form in *assumpsit ante*, and another form, 2 B. & Cres. 573; see a form in debt for penalties, *ante*, vol. ii. 362; also pleas of, in covenant, *post*. See the statute and law in 1 Chit. Col. Stat. tit. "*Stock Jobbing*." See form of plea in an action on the case against directors of a joint stock company for false representations, that the company was a company illegally presuming to act as a corporate body without authority, *Shrewsbury v. Blount*, 2 M. & G. 491, 492.

STOCK-JOBBING. &c. the plaintiff, for and on the behalf of the defendant, contracted and agreed with the said J. L. that the said J. L. should sell to the defendant, and that the defendant should buy of the said J. L. a certain other interest or share in a public stock, to wit, other [£4000] in the public stock commonly called the Three Pounds per centum Consolidated Bank Annuities, and that the same should be transferred by the said J. L. to the defendant on the [12th] day of [April] in the same year. And the defendant further saith, that the said J. L. was not, at the time of the making of the said contract and agreement, actually possessed of or entitled unto the said interest or share in the said public stock, so agreed to be sold and transferred by him as last aforesaid, in his own name or in his own right, or in the name or names of a trustee or trustees to or for his the said J. L.'s use, or his own right, as the plaintiff then well knew, contrary to the form of the statute in such case made and provided; and thereupon afterwards, to wit, on the said [12th] day of [April], A.D. [1792,] aforesaid, the plaintiff did then, for and on the behalf and as agent of the defendant, voluntarily pay from and out of his own monies a certain sum of money, to wit, the sum of [£80] to the said J. L. for the compounding, satisfying and making up a certain difference for his the defendant's not receiving the said last-mentioned interest or share in the said public stock and for the not performing of the said last-mentioned contract and agreement, the said stock then not being any public or joint stock, or other public security, bought by the defendant or the plaintiff, or any other person or persons, to be delivered, accepted or paid for on a future day, and which had been or was refused or neglected to be transferred, and the said difference or sum of [£80] then not being recovered or received by the said J. L. or any other person or persons, being the person or persons who first contracted to sell or deliver such public or joint stock, or other securities, as the damage which had been sustained by reason of the not delivering or not transferring such stock or other securities by the plaintiff, or any other person or persons; contrary to the form of the statute, &c. And the defendant further saith, that for the purpose (amongst other things) of securing to the plaintiff the re-payment to him by the defendant of the said difference so paid as last aforesaid, the defendant, on the said —— day of ——, A.D. ——, aforesaid, made and sealed, and as his act and deed delivered to the plaintiff the said writing in the said declaration mentioned, and the plaintiff then accepted and received the same of and from the defendant upon and for the consideration and for the purpose last aforesaid; contrary to the form of the statute, &c. And this the defendant is ready to verify, &c.

Another plea. And for a further plea in this behalf, the defendant says, that before the making of the said supposed writing obligatory, to wit, on &c. the plaintiff had, contrary to the statute &c. negociated the payment of, and had paid for and on the account of the defendant a large sum of money, to wit, the sum of [£4574 : 5*s*.] for certain differences by the plaintiff, for and on the behalf of the defendant, bargained for, and agreed to be paid by the defendant for and on account of certain unlawful wagers and contracts, touching and relating to the stocks and public funds, to wit, the 3 per cent. consols, in lieu and instead of accepting and paying for transfers of such

stock to him from the vendors thereof; and thereupon it was then corruptly and unlawfully and against the form of the statute &c. agreed by and between the defendant and the plaintiff, that the defendant should, for securing the repayment of the said differences, make and seal, and as his act and deed deliver to the plaintiff, the said writing in the said declaration mentioned. And the defendant further says, that the said writing in the said declaration mentioned was made and sealed and delivered by the defendant to the plaintiff on the terms aforesaid, whereby the said writing obligatory was and is void. And this the defendant is ready to verify, &c.

Stock-Jobbing.

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8. Set-off.

Set-off.

Set-off to debt on bond. (*s*)

After craving oyer as ante, 174.] The defendant says, that at the time of the commencement of this suit there was due and owing from the defendant to the plaintiff, upon the said writing obligatory, by the said condition thereof, for the principal and interest in the said condition mentioned, a certain sum of money, to wit, the sum of £——, and that the plaintiff before and at the time of the commencement of this suit was and still is indebted to the defendant in a much larger sum of money than the money due and owing from the defendant to the plaintiff upon the said writing obligatory, that is to say, in the sum of £——, for &c. [*here state the subject-matter of set-off as in assumpsit, ante*, 114, 115,] which said sum of money so due and owing from the plaintiff to the defendant is wholly unpaid and exceeds the money so due and owing from the defendant to the plaintiff by virtue of the said condition of the said writing obligatory, and which said sum of money due and owing from the plaintiff to the defendant as aforesaid, or so much thereof as shall be necessary in this behalf, he the defendant is ready and willing and hereby offers to set off and allow against the said sum of money, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

Plea to an action on two bonds of set-off on two bonds given by plaintiff to defendant.

And for a further plea in this behalf, the defendant says, that the said writing obligatory, in the first count of the said declaration mentioned, was

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(*s*) See the forms, *ante*, 114, 115, 172; 2 Rich. C. P. 29, 30, 31; 5 Wentw. 484; 7 Wentw. 589, 590, 591, &c.; *Tucker* v. *Tucker*, 4 Bar. & Adol. 746. When either of the debts accrued by reason of a *penalty*, the debt intended to be set off must be *pleaded*, and the defendant cannot give notice of set-off, 8 Geo. 2, c. 24, s. 5; and by the same statute, in a plea of set-off to an action on a bond, the defendant must set forth the sum really due on the bond, before he is entitled to set off any cross demand, 6 T. R. 460; and the sum is traversable though laid under a *scilicet*, *id. ibid.*; 3 T. R. 65; *ante*, vol. i. Index, tit. "*Set-off.*" See the forms indexed, 7 Wentw. 589, 590, 591, &c. The plea of set-off to debt on simple contract nearly resembles those in assumpsit, *ante*, 114, 115. The following form has sometimes been adopted, "*Actio non*, because *protesting* that there is nothing due and owing from the defendant to the plaintiff upon or by virtue of the said supposed writing obligatory in the said first count mentioned, for plea in this behalf to the whole of the declaration, the defendant says, that at the time of commencing the suit of the plaintiff in this behalf, there was due and owing from the defendant to the plaintiff upon the said writing obligatory, by the condition thereof, for the principal and interest in the said condition mentioned, a certain sum of money *only*, to wit, £——, and the defendant further saith, that &c." [*Here stating the set-off.*]

SET-OFF.

and is conditioned for the payment of the sum of £—— of lawful &c. and interest for the same by the defendant to the plaintiff on a certain day now past, and that at the time of commencing this suit there was due and owing from the defendant to the plaintiff, upon the last-mentioned writing obligatory, by the condition thereof, for the principal and interest in the said condition mentioned, a certain sum of money, to wit, the sum of £—— of like lawful money, and no more. And the defendant further says, that the said writing obligatory, in the said last count of the said declaration mentioned, was and is conditioned for the payment of the sum of £—— of like lawful money, and interest for the same, by the defendant to the plaintiff on a certain day now past, and that at the time of commencing this suit there was due and owing from the defendant to the plaintiff, upon the last-mentioned writing obligatory, by the condition thereof, for the principal and interest in the said last-mentioned condition specified, a certain other sum of money, to wit, the sum of £—— of like lawful money, and no more. And the defendant further says, that long before the commencement of this suit, to wit, on &c., the plaintiff, by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound unto the defendant in the penal sum of £—— of good and lawful money of Great Britain, to be paid to the defendant when he the plaintiff should be thereto afterwards requested, which said last-mentioned writing obligatory was and is conditioned for the payment of the sum of £—— of like lawful money of Great Britain, together with interest for the same, by the plaintiff to the defendant, at a certain day now past, and which said last-mentioned writing obligatory still is in full force and effect, not in anywise released, paid off, satisfied, or discharged. And the defendant further says, that long before the commencement of this suit, to wit, on &c. aforesaid, the plaintiff, by his certain other writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is the same day [&c. &c. *as before.*] And the defendant further says, that at the time of the commencement of this suit, there was and still is due and owing upon the said two last-mentioned writings obligatory, by the respective conditions thereof, for the principal and interest in the said conditions respectively mentioned, a certain sum of money, to wit, the sum of £—— of like lawful money, which said last-mentioned sum of money, so due and owing from the plaintiff to the defendant, greatly exceeds the monies due and owing from the defendant to the plaintiff upon the said writings obligatory in the said declaration mentioned, by the respective conditions thereof, for the principal and interest in the same conditions respectively mentioned, and out of which said sum of money, so due and owing from the plaintiff to the defendant as aforesaid, he the defendant is ready and willing and hereby offers to set off and allow to the plaintiff the said monies so due and owing from him the defendant to the plaintiff as aforesaid, according to the form of the statute in such case made and provided. And this the defendant is ready to verify, &c.

9. Bankruptcy.

Bankruptcy.

Bankruptcy of plaintiff.

See ante, 69.] To debt on bond or other specialty brought in the name of a bankrupt, as there is no general issue or form of plea prescribed by 6 Geo. 4, c. 16, it is necessary to plead his bankruptcy specially. The form of the plea is in 7 Wentw. 414; Morg. 530. As to this plea, see 1 T. R. 619; 3 B. & P. 40, and *ante*, 69; 15 East, 622; 5 B. & A. 16. See form of plea of bankruptcy of *defendant* in debt on simple contract, *ante*, 171; of his bankruptcy to debt on bond, 2 B. & Ald. 803.

10. Statute of Limitations.

Statute of Limitations.

As to the pleading the statute in debt, see *ante*, 172; and 1 Saund. 283, n. 2, 35, 208; 2 Saund. 62 c, n. 6. To debt on specialty, there was not before the Law Amendment Act any plea of the Statute of Limitations, though after the lapse of twenty years payment would in general *be presumed* of a money bond, provided the defendant plead *solvit ad* or *post diem*. See Tidd's Practice, 9th edit. 18, 19; 1 Campb. 217.

Solvit ad diem.

After craving oyer as ante, 174.] And the defendant says, that he the defendant, on the said —— day of ——, A. D. ——, aforesaid, [*the day of payment mentioned in the condition*] in the said condition of the said writing obligatory mentioned, paid to the plaintiff the said sum of £—— in the said condition mentioned, *together with all interest due thereon*, according to the form and effect of the said condition. And this the defendant is ready to verify, &c. (t)

Solvit post diem.

And for a further plea in this behalf, the defendant says, that he the defendant, after the said —— day of ——, A. D. ——, in the said condition (u)

(t) See Com. Dig. Pleader, 2 W. 29; Bac. Ab. 666. See precedent, Morg. 533. As to evidence on, see Tidd's Prac. 9th edit. 18, 19. This plea need not be signed in Q. B. 5 T. R. 661, nor is it the practice to sign it in C. P. Reg. Gen. Hil. T. 4 Will. 4, orders "pleas of *solvit ad diem*, and of *solvit post diem*, not *both* to be allowed." Unless defendant is confident that the payment was made on the very day named in the deed, it is better to plead *solvit post diem*.

A plea of payment *ad diem* in assumpsit may conclude to the country; *aliter*, if paid *after* the day; 1 Cr. M. & Ros. 523, note (*a*). If the *declaration* state *breach* or non-payment of principal sum, a plea of payment of that and *interest* is demurrable; *Bishton* v. *Evans*, 2 Cr. M. & R. 14.

(u) See form Morg. 533, 534, 652; Plead. A. 359. This plea is given by the statute 4 & 5 Anne, c. 16, the 12th section of which enacts that where an action of debt is brought "upon any bond which hath a condition of defeazance to make void the same upon payment of a lesser sum at a day or place certain," if the obligor has before action brought paid the principal and interest due by the defeazance, although not strictly according to the condition, such payment may be pleaded to the action, and shall be an effectual bar. The 13th section enacts, that if at any time pending an action upon any such bond with a penalty the defendant shall bring into Court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits at law or in equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the Court shall and may give judgment to discharge every such defendant of and from the same accordingly." Under this section the amount due is computed by the master, and the defendant cannot *plead* the payment into Court; *England* v. *Watson*, 9 M. & W. 333; 1 Dowl. N. S. 398, S. C.

The obligor cannot plead payment as to part of the sum due, leaving the residue unanswered in that plea, although pleaded to in a separate plea, nor can he plead in satisfaction the delivery of bills of exchange or other securities of an inferior degree to the bond; *Worthington* v. *Wigley*, 3 Bing. N. C. 454;

STATUTE OF LIMITATIONS.

mentioned, and before the commencement of this suit, to wit, on &c. paid to the plaintiff the said sum of £——, in the said condition mentioned, together with all interest then due thereon. And this the defendant is ready to verify, &c.

BY EXECUTORS, HEIRS, &c.

11. BY EXECUTORS, HEIRS, &c.

Plene administravit before notice of the bond. (*x*)

And for a further plea in this behalf, the defendant says, that after the death of the said E. F. and before the defendant had any notice of the said writing obligatory in the said declaration mentioned, to wit, on &c. he the defendant had fully administered all and singular the goods and chattels which were of the said E. F. deceased, at the time of his death, and which have ever come to his hands as executor as aforesaid to be administered; and that he hath not, nor had he at the time when he first had notice of the said writing obligatory, or at any time afterwards, any goods or chattels which were of the said E. F. deceased at the time of his death, in the hands of the defendant, as executor as aforesaid, to be administered. And this the defendant is ready to verify, &c.

Plea to declaration in debt on bond, by administrator *de bonis non*, against administrator of obligor, that judgment was recovered against defendant on two bonds of intestate's, and *plene administravit præter* £——, which is insufficient to pay the judgment. (*y*)

And for a further plea in this behalf, the defendant says, that the said W. Earl of F. in his lifetime, to wit, on &c. by his certain writing obligatory, sealed with his seal, and by him then duly delivered, acknowledged himself to be held and firmly bound to one J. B. in the sum of £—— to be paid to the said J. B. when he the the said W. Earl of F. should be thereunto afterwards requested, which said writing obligatory, at the time of the death of the said W. Earl of F. and of the recovery of the judgment hereinafter mentioned, remained in full force and effect, and in no wise annulled, discharged, paid off or satisfied; and the said W. Earl of F. also in his lifetime, heretofore, to wit, on &c. by his certain writing obligatory, sealed with his seal, and by him then duly delivered, acknowledged himself to be held and firmly bound to the said J. B. in the further sum of £—— of good and lawful money of Great Britain, to be paid to the said J. B. when he the said W. Earl of F. should be thereto afterwards requested, which said last-mentioned writing obligatory, at the time of the death of the said W. Earl of F.

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5 Dowl. 504, S. C. The statute of Anne does not extend to the crown; 1 Price, 23. *Semble*, a post obit bond is within the statute; 2 B. & A. 82. When executors plead *solvit post diem*, and rely upon the presumption of payment arising from the lapse of time, it is advisable in general to plea *solvit post diem* as well by the testator as by the executor in separate pleas; and see Rep. Temp. Hardw. 133; 1 Stra. 652; Tidd's Prac. 9th ed. 18.

(*x*) This plea is sometimes adopted, but the general plea of *plene administravit*, putting in issue the *due* administration of the assets, will in general suffice. See form of plea of *plene administravit* in assumpsit or debt on simple contract, which will answer here, *ante*, 130. To *scire facias* on a judgment, the defendant, an executrix, pleaded that she fully administered *before she had notice of the judgment*, and that she had no assets since. Replication, that defendant had notice of the judgment on &c. and had assets afterwards. Held, that the mention of notice in the plea was surplusage, and the replication bad, as leading to an immaterial issue; for a judgment, to be entitled to preference in administration, must be docketed pursuant to 4 & 5 W. & M. c. 20, and notice of it in any other way is of no consequence; *Hall* v. *Tapper*, 3 Bar. & Adol. 655.

(*y*) See forms, 5 Wentw. 387; 7 Wentw. 460, 362. See pleas in assumpsit, *ante*, 133. In those pleas the foundation of the judgment is not shown; but in an action of debt, when on a specialty, it is necessary to show that the debt, on which the judgment was recovered, was a specialty, or to aver that the judgment was recovered before the defendant had notice of the plaintiff's demand, 1 T. R. 690; see form of plea of retainer to satisfy a bond debt to defendant, administrator, 6 T. R. 550.

and of the recovery of the judgment hereafter mentioned, remained in full force and effect, and in no wise annulled, discharged, paid off or satisfied; and the said two last-mentioned writings obligatory remaining in full force, the said J. B. for recovery of the said several debts, after the death of the said W. Earl of F. and after the granting of the said administration, to wit, on the —— day of ——, A.D. ——, in her said majesty's Court, before the queen herself, impleaded the said R. Earl of F. as the administrator with the will annexed of all the goods and chattels, rights and credits, which were of the said W. Earl of F. at the time of his death, in a certain plea of debt for the said sums of £—— and £——, making together the sum of £—— upon the said two last-mentioned writings obligatory; and such proceedings were thereupon had in the same Court, that the said J. B. afterwards, to wit, on the —— day of ——, A.D. ——, by the judgment of the same Court, recovered against the said R. Earl of F. as administrator with the will annexed as aforesaid, as well the said several debts &c. amounting &c. as also the further sum of &c. for the damages which he had sustained as well by occasion of the detaining of that debt, as for his costs and charges by him about his suit in that behalf expended, to the said J. B. by the Court there adjudged, to be levied of the goods and chattels which were of the said W. Earl of F. at the time of his death, and which were of the said W. Earl of F. to be administered, if he had so much in his hands to be administered, and if he had not so much thereof in his hands to be administered, then the same damages to be levied of the proper goods and chattels of the said R. Earl of F.; whereof the defendant was convicted, as by the record and proceedings thereof remaining in the said Court of our said lady the queen, before the queen herself at Westminster, more fully appears; which said judgment still remains in full force and unsatisfied; and the said R. Earl of F. saith, that he hath fully administered all and singular the goods and chattels which were of the said W. Earl of F. at the time of his death, which hath come to his hands to be administered, and that he hath not, nor at the time of the commencement of this suit, or ever afterwards, had any goods and chattels belonging to the said W. Earl of F. at the time of his death to be administered, except goods and chattels to the amount of £——, which are not sufficient to satisfy the said judgment in form aforesaid given, and which are subject and liable to the satisfaction thereof. And this the defendant is ready to verify, &c. [*If the defendant has no assets whatever in hand, add a plea of plene administravit generally.*]

By Executors, Heirs, &c.

And for a further plea in this behalf, the defendant saith, that he the defendant hath not, nor at the time of the commencement of this suit, nor at any time before or since, had any lands, tenements or hereditaments, by

Rien per descent by heirs. (s)

(s) See the form indexed in 7 Wentw. 603, 4; Rast. Ent. 172; 2 Rich. C. P. 450; Plead. A. 364; Morg. 652; Lil. Ent. 112; and as to the pleas in general by an heir, see 2 Saund. 7, n. 4; Com. Dig. Pleader, 2 E. 3; Bac. Ab. Heir, F. The heir must plead *rien per descent* when he has no assets, or he will be liable personally to the amount of the debt, 3 T. R. 685. See a plea of retainer by an heir, 1 T. R. 454. As to what are assets by descent, see Williams' Executors, 3d edit. As to the plea of *rien per descent prætor* a term for life or years, 2 Saund. 7, n. 4; 1 Salk. 351; 2 Wils. 49. See a form of *rien per descent prætor* a rectory, &c. Rast. Ent. 172 b; 1 Lil. Ent. 180; 5 Mod. 121, 122.

By Executors, Heirs, &c.

descent from his said father [*or* "brother," *&c. according to the fact,*] *in fee simple or of descendible freehold.* And this he is ready to verify; wherefore he prays judgment, if he, as son [*or* "brother," *&c.*] and heir of the said G. H. deceased, ought to be charged with the said debt, by virtue of the said *writing obligatory.*

Plea by a devisee *rien per devise.* (*a*)

And for a further plea in this behalf the defendant saith, that he the defendant hath not, nor at the time of the commencement of this suit, nor at any time before or since, had any lands, tenements or hereditaments by devise from the said E. F. deceased. And this the defendant is ready to verify, &c.

On Annuity Deeds.

12. On Annuity Deeds.

To debt on annuity bond, that no memorial thereof was enrolled according to 53 G. 3, c. 141. (*b*)

After craving oyer of the bond and condition, &c. as ante, 174.] And the defendant says, that the said writing obligatory was made and entered into by the defendant to the plaintiff after the passing of a certain act of parliament passed in the fifty-third year of his late majesty, King George the

(*a*) See the forms, 2 Rich. C. P. 38, 9; 7 Wentw. 603 to 605. Under the 3 & 4 W. & M. c. 14, the devisee must have been sued jointly with the heir. As to the present law, see *ante*, vol. i. p. 60. By 11 Geo. 4 & 1 W. 4, c. 47, s. 4, it is enacted that, "if in any case there shall not be any heirs-at-law, against whom jointly with the devisee or devisees a remedy is hereby given, in every such case every creditor, to whom by this act relief is so given, shall and may have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid." Where the obligor of a bond, having devised his land, died before the passing of this statute, it was held that the specialty creditor could not maintain an action against the devisee alone, there being no heir, under the 3 W. & M. c. 14, s. 3; *Hunting* v. *Sheldrake*, 9 M. & W. 256. To maintain an action of debt on 3 & 4 W. & M. c. 14, against the heir and devisee, it is necessary that a debt should have accrued to the plaintiff in the lifetime of the devisor: and if in such action the declaration does not show that the cause of action accrued in the lifetime of the devisor, and the defendant pleads that before the cause of action the devisor died, and the plaintiff demurs, the defendant is entitled to judgment on the ground that either the declaration is defective in not alleging that the cause of action accrued in the lifetime of the devisor, or that if such allegation is to be implied, the allegation is material, and is well traversed by the plea; *Farley* v. *Briant*, 2 C. M. & R. 42; 3 A. & E. 839; 5 N. & M. 42, S. C.

(*b*) See forms, 7 Wentw. 526; 1 East, 398; 3 East, 461; 1 New Rep. 214; 4 T. R. 588; 2 Hen. Bla. 280; 3 T. R. 599; 4 B. & C. 69; 2 Dowl. Rep. 695. The act now in force relating to the enrolment of annuities granted after the 14th July, 1813, is the 53 G. 3, c. 141, which repeals the 17 G. 3, c. 26, except as to annuities granted before that day. See pleas under the former statute, Chitty's Pleading, 6th edition, vol. iii. p. 862. For the construction and decisions to be put upon the 53 G. 3, c. 141, see fully the notes in 1 Chit. Col. Stat. tit. Annuity, p. 23 to 28, and see *Earle* v. *Brown*, 2 P. & D. 393. The circumstances of the 53 G. 3, c. 141, s. 5, introducing a power to the grantor to enforce the delivery of copies of the original deeds, and thereby to obtain full information of the transaction, has induced the Courts to require less particularity in the memorial than was essential under the 17 G. 3, c. 26; 6 B. & C. 371. The form of the memorial is given in the 53 G. 3, c. 141. A memorial under this statute must state the names of all the parties to it, although one of them may take no interest under it or have executed it; *Huggins* v. *Coates*, 1 Dowl. N. S. 627. If a memorial has in fact been enrolled, but not properly so, then the next plea should be added, pointing out the objection to the memorial, and such objection should be stated according to the fact, and so that there be no *departure* from it in the rejoinder. Thus in 4 T. R. 585, and 2 Hen. Bla. 280, where to an action of debt on a bond given to secure an annuity, the defendant pleaded that *no such memorial was enrolled* as required by the statute, and the replication stated that a memorial was enrolled, containing the particulars which the statute directs, and the rejoinder alleged that the memorial in the replication mentioned did not truly set forth the consideration on which the annuity was granted; it was held, that this was clearly a *departure* from the plea; see also 2 Saund. 183 to 188, but see 11 East, 188. A plea stating a defective memorial should show that there was no other enrolled; 1 Marsh. 155; 1 New Rep. 214.

On Annuity Deeds.

Third, and that the said annuity in the said condition mentioned was granted upon and for a pecuniary consideration in that behalf, and that the said writing obligatory was made and entered into by the defendant to the plaintiff for the said pecuniary consideration (*c*) by him given and paid to the defendant in that behalf as aforesaid (*c*), and that no memorial of the said writing obligatory was enrolled in the High Court of Chancery within thirty days (*d*) after the execution thereof, according to the directions of the said act, whereby the said writing in the said declaration mentioned was and is null and void. (*e*) And this he the defendant is ready to verify; wherefore he prays judgment if he ought to be charged with said debt by virtue of the said supposed writing obligatory. [*If a defective memorial has been enrolled, add the following plea.*

No proper memorial enrolled, containing the names of the witnesses, &c. according to 53 G. 3, c. 141. (*f*)

And for a further plea in this behalf, the defendant says, that (*g*) no memorial of the said writing, containing the names of all the witnesses thereto [*or* "of the date of the said deed," *or* "writing &c." *or* "of the names of all the parties thereto," *or* "of the person or persons for whose life or lives the said annuity [*or* "rent charge"] was granted," *or* "of the person or persons by whom the said annuity was to be beneficially received," *or* "the pecuniary consideration or considerations for granting the said annuity," [*or* "rent-charge,"] *or* "how such consideration or considerations were paid," *or* "the annual sum or sums to be paid thereby,"] was enrolled in the High Court of Chancery, according to the directions of the act of parliament made and passed in the fifty-third year of the reign of his late majesty King George the Third, whereby the said writing in the said declaration mentioned is null and void. And this the defendant is ready to verify, &c.

Plea of payment and acceptance of a sum of money in redemption of the annuity.

See pleadings in *Lane* v. *Drinkwater*, 3 Dowl. 225; 1 Crom. M. & Ros. 602, S. C.

(*c*) Unless for a *pecuniary* consideration, the deed need not be enrolled. See the cases fully collected in 1 Chit. Col. Stat. 27, 28, n. If the consideration does not appear in the declaration or deed set out on oyer to have been pecuniary, it should seem the plea ought to show expressly how the consideration arose, and see form 4 B. & C. 69; 6 D. & R. 68, S. C., and 7 East, 529.

(*d*) A memorial enrolled within thirty days after execution of the deed by the grantee is good, though before execution by the grantor; 10 Moore, 28; 3 Bing. 215; 6 B. & C. 49, S. C. in error. And where a trustee executed the deed after enrolment, it was held that such execution need not be enrolled; 1 Stark. Rep. 431.

(*e*) See form of plea of no proper memorial of bond, 2 Dowl. 695. The omission to memorialize the annuity, though at request of grantor, will still render it void; 2 Chit. Rep. 34. An annuity deed and every deed, &c. by which an annuity is secured, is *absolutely void* if the memorial be not registered according to the directions of the act, 2 T. R. 603; and if the memorial of a deed be defective, the whole deed is void to all intents, 5 T. R. 641. But where A. purchased an annuity for his life, which was regularly paid up to the time of his death, but no memorial of the grant was enrolled: it was held that A.'s executrix could not, on that ground, insist that the contract was void, and recover back the consideration money paid for the annuity; 6 B. & C. 651. A judgment upon a warrant of attorney being one of the securities, and judgment being referred to as entered up, need not be set forth in the memorial; *Richardson* v. *Tomkins*, 9 Bing. 51; 2 Moore & Scott, 56, S. C. As to the conclusion of replication averring enrolment of memorial, *id. ibid.*

(*f*) See form, *Hicks* v. *Cracknell*, 3 M. & W. 72; and Replication, *post*. As to what is a sufficient memorial see 1 Chit. Col. Stat. tit. Annuity, p. 23 to 28, notes. The memorial might be set out in the plea, which was done in 5 B. & Ald. 445; and see 3 Bing. 215.

(*g*) If it does not appear from the declaration or deed set out that the consideration was pecuniary, the fact of its being so, and how, should be stated; see form, 4 B. & C. 69; 6 D. & R. 68, S. C.

On Annuity Deeds.

Payment of the annuity on the day mentioned in the bond. (h)

And for a further plea the defendant saith, that he the defendant did, [*here aver the payment of the annuity on the days mentioned in the bond, and which may be as follows:*] well and truly pay to the plaintiff yearly and every year the said annuity or sum of £—— in the said condition mentioned, by four equal quarterly payments in each year, on the several and respective days and times by the said condition of the said writing obligatory appointed for the payment thereof, according to the form and effect of the said condition. And this the defendant is ready to verify, &c.

Payment after the day. (i)

And for a further plea in this behalf, the defendant says, that he the defendant, after the making of the said writing obligatory and before the commencement of this suit, to wit, on &c. paid to the said E. F. all and every the sums of money which had at any time before then become due and owing upon or by virtue of the said writing obligatory and the said condition thereof, after each of the said several respective sums of money became and were due and owing under and by virtue of the said writing obligatory and the condition thereof. And this the defendant is ready to verify, &c.

Mortgage Deeds.

13. Mortgage Deeds.

Plea to the residue of the money demanded in the first count, that plaintiff received the amount out of the rents and profits of the property mortgaged.

And for a further plea as to the residue of the said sum in the said first count demanded the defendant saith, that in and by the said indenture in the said first count mentioned the defendant conveyed, assigned and assured, and caused to be conveyed, assigned and assured to the plaintiff divers messuages, lands and premises as a security to the plaintiff for the payment of the said sum of £4724 and interest, with power to the plaintiff in case the said last-mentioned sum and interest were unpaid to enter into and upon the same tenements, and take and receive the rents, issues and profits thereof towards and in payment, satisfaction and discharge of the said sum of £4724 and interest, to the extent to which the said rents, issues and profits would be sufficient to discharge the same sum of £4724 and interest. And the defendant avers that the said last-mentioned sum and interest being unpaid, the plaintiff, long before the commencement of this suit, to wit, on the first day of January, in the year of our Lord, 1830, entered into and upon the said messuage, lands and premises by virtue of the said last-mentioned indenture, in order to take and receive the said rents, issues and profits for the purpose aforesaid, and the plaintiff hath accordingly from that time hitherto been in the receipt of and hath from time to time received such rents, issues and profits to a large amount, to wit, exceeding the residue of the said sum in the said first count demanded. And the defendant avers that at the time of the commencement of this suit the plaintiff had accepted and received for and on account of such rents, issues and profits, by virtue of the said last mentioned indenture, the full amount of the said residue of the said sum in the said first count demanded, in full satisfaction and discharge thereof. And this the defendant is ready to verify, &c.

(h) See a form Petersd. 46.

(i) See 4 & 5 Ann. c. 16, s. 12, and Doug. 519; *ante*, vol. i. Index, "*Payment.*"

Mortgage Deeds.

And for a further plea as to the sum of £4724, parcel of the said sums in the said last count mentioned, the defendant saith, that after the last-mentioned sum of £4724 became due, and before the commencement of this suit, to wit, on the 16th day of March, A. D. 1829, by a certain indenture then made between the defendant of the one part and the plaintiff of the other part, and then sealed with the defendant's seal and delivered duly executed to the plaintiff, the defendant covenanted with the plaintiff that he the defendant would, on demand made thereof, well and truly pay or cause to be paid to the plaintiff the last mentioned sum of £4724 and interest for the same, at the rate of £5 for every one hundred pounds by the year; and the plaintiff then accepted and received the last-mentioned indenture and covenant in full satisfaction and discharge of the said last-mentioned sum of £4724, parcel &c. And this the defendant is ready to verify, &c.

To £4724, parcel of the money mentioned in the last count, that plaintiff accepted defendant's deed and covenant in satisfaction.

14. On Abitration Bonds.

On Arbitration Bonds.

After craving oyer of the bond and condition for the performance of award as ante, 174.] The defendant says, that the said arbitrators, named in the said condition, did not, nor any two of them, on or before the said —— day of ——, A. D. ——, mentioned in the said condition, make any award in writing under their hands, or the hands of any two of them, [*this must be according to the averment in the declaration,*] of and concerning the premises in the said condition mentioned and so referred as aforesaid, ready to be delivered to the said parties in difference. And this the defendant is ready to verify, &c.

No award made. (*k*)

After craving oyer of the bond and condition as ante, 174.] And the defendant says, that after the making of the said writing obligatory, and before the said —— day of ——, A. D. ——, in the said condition mentioned, to wit, on the —— day of ——, A. D. ——, the said G. H. and J. K. did make their award in writing under their respective hands of and concerning the premises in the said condition mentioned, and so referred to them as afore-

Plea setting forth award, and stating plaintiff's non-performance of a condition precedent. (*l*)

(*k*) See forms, 2 Saund. 184; 1 Saund. 63, 165; 2 Rich. C. P. 44; Morg. 526. This plea will suffice where there was no award whatever, or there was an award in *fact*, but upon the face of it it was not according to the submission, and therefore if the plaintiff reply, setting out an award partially, the defendant may rejoin, setting out the whole, and the rejoinder will not be a departure; 11 East, 188; but see 4 T. R. 588. But the better course seems at least to add a plea setting out the defective award; 16 East, 58; Wats. on Awards, 211, notes; *post*. As to the replication see 2 Saund. 62 b. If the award appears bad upon the face of the declaration, the defendant may demur. In an action of debt for not performing the terms of an award, on a plea denying that the arbitrator duly made and published his award of and concerning the premises referred in manner and form, &c.; the production of the award and the rule of Court is sufficient *primâ facie* evidence to support the issue on the part of the plaintiff, until the validity of the award be impeached by evidence *dehors* on the part of the defendant; *Gisbourne* v. *Hart*, 5 M. & W. 50. But where the agreement of reference alluded only to one account between the plaintiff and a third person, and the arbitrator's certificate was general in its terms, it was held on a traverse that the certificate was of and concerning the matter in reference *modo et forma*, that the plaintiff's case was not sustained by the production of the certificate without evidence to show that the arbitrators really adjudicated on the particular matter referred to them; *King* v. *Bowen*, 8 M. & W. 625.

(*l*) See form, 13 East, 23.

On Arbitration Bonds.

said, and ready to be delivered to the said parties in difference, and did thereby award, arbitrate and determine, that &c. [*here set forth the whole of the award without the recitals, and which award directed the plaintiff to perform an act which constituted a condition precedent,*] as by the said award, reference being thereunto had, will more fully appear, which said matters above recited are the whole of the matters by the said award directed to be performed by the plaintiff and defendant respectively. And the defendant in fact saith, that the defendant at the day in the said award in that behalf directed, to wit, on the said —— day of ——, A. D. ——, in the said award mentioned, requested the plaintiff to &c. [*to perform the act by the award directed to be done by the plaintiff,*] and to perform the said award in all things on his part and behalf to be performed, and the defendant was then ready and willing and offered to the plaintiff to perform the said award in all things on his part to be performed and fulfilled, if the plaintiff would perform the said award in the several matters and things directed to be performed by him the plaintiff, but the plaintiff then wholly refused to &c. [*state the plaintiff's non-performance of the condition precedent,*] and to perform the said award in the several matters and things directed by the said award to be performed on the part and behalf of him the plaintiff. And this the defendant is ready to verify, &c.

Other pleas to debt on arbitration bonds, &c.

See the forms indexed, 7 Wentw. 611, 612; 13 East, 23; Morg. Prec. 523; Plea. Assist. 352; Caldw. on Arbitration, 335 to 355; Watson on Awards. Care must be taken to state with precision the ground of defence in the plea.

If there were an award in fact, and the defendant rely upon some defect therein, he should not merely plead that no award was made, because he cannot under that plea go into objections to the award in point of law; 4 T. R. 588; 16 East, 39. But see 11 East, 188; *ante*, 189, note (*k*). If there was an award made which appears on the face of the declaration to have been a defective one, the proper course is for defendant to demur. If it requires an averment to show why the award is defective, the plea must be framed accordingly; and where the award may or may not be final or certain according to intrinsic facts, the defendant should state such facts in his plea; as an award that expenses already incurred in a suit by the parties were to be allowed as part of a sum of money to be contributed by each is certain or not, according to the fact, whether such expenses were or were not a matter in difference, in such case, if the defendant object to the award for uncertainty, he should not set out the award and demur, but plead specially the fact, to show that in this respect the award was uncertain; 3 D. & R. 433; 2 B. & C. 170, S. C. If the condition of the bond be, "that the award shall be made and ready to be delivered to the parties, or such of them as shall require it, on such a day," if the defendant have requested the arbitrator to deliver the award on that day, and the arbitrator neglect or refuse so to do, the defendant should not plead "*nul tiel agard*" only, but should plead specially that he requested the arbitrators to deliver the award, and they refused so to do; 1 Saund. 327 b, n. 3. So if the defendant rely upon the non-performance by the plaintiff of a condition precedent, or that the award was not ready to be delivered, he should plead those facts specially; 2 Saund. 183 to 188; 1 Saund 327 b.

On Arbitration Bonds.

As to a plea of performance generally, see the precedent and notes in 1 Saund. 324.

Partiality and improper conduct in an arbitrator in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond conditioned for the performance of the award, but is only matter for application to the *equitable jurisdiction* of the Court to set aside the award; *Braddick* v. *Thompson*, 8 East, 344; 1 Saund. 327 b; and see *Grazebrook* v. *Davis*, 5 B. & C. 534; 8 D. & R. 295, S. C.; *In re Hall and Hinds*, 2 M. & G. 847.

Neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action; 8 East, 344; 1 Saund. 327 a, n. 3, 30, 31.

But the omission of the arbitrators to award upon a part of the matters in difference may be pleaded; 16 East, 56; 2 B. & C. 170; 3 D. & R. 433, S. C.

To debt on bond for the performance of an award the defendant cannot plead that he revoked the arbitrator's authority, for he would thereby admit a breach of the condition of the bond; see 5 Taunt. 452; 8 Rep. 162; see 1 D. & R. 106; 5 B. & A. 507, S. C.

15. Foreign Attachment.

Foreign Attachment.

As to the plea of foreign attachment, see Lord Raym. 636; 3 East, 366, 380. In the Lord Mayor's Court, *M'Grath* v. *Hardy*, 6 Dowl. 749; 4 Bing. N. C. 782, S. C.

16. On Bail Bonds.

On Bail Bonds.

Plea that there was not any such process against principal. (m)

And the defendant, by J. D. his attorney, says, that no writ of capias, as in the said declaration mentioned, whereupon the said E. F. could or might be arrested, or holden to special bail, was sued or prosecuted at the suit of the plaintiff against the said C. D. out of the said Court, as in the said condition mentioned, before the making of the said alleged writing obligatory. And this the defendant is ready to verify, &c.

That bail above were duly put in within eight days after arrest. (n)

The defendants, by J. D. their attorney, say, that the said E. F. did, after the making of the said writing obligatory, to wit, within eight days after the

(m) See Morgan's Precedents, 514; 7 Wentw. 613; *Gurney* v. *Hopkinson*, 1 Crom. M. & Ros. 587; and the form of plea in *Finch* v. *Cocken and another*, 3 Dowl. 679. This plea is proper when the defendant was misnamed in the writ, or such writ in any other respect varied from that described in a declaration on bail-bond.

(n) See declaration on bail-bond, *ante*, vol. ii. 320. The putting in bail must be pleaded precisely according to the condition of the bond as stated in the declaration.

On Bail Bonds.

execution of the said writ on him, inclusive of the day of such execution, to wit, on the —— day of ——, A. D. ——, cause special bail to be put in for him to the said action in the said condition mentioned, in the said Court, according to the exigency of the said writ and the form and effect of the said condition; and thereupon heretofore, to wit, on the —— day of ——, A.D. ——, according to the exigency of the said writ and the course and practice of the said Court, G. H. and J. K. came into the said Court in their proper persons, and then became pledges and bail [*&c. set out the recognizance, and stating that they became bail,* "in the said action against the said E. F. the same being an action on promises," *as the case may be,*] as by the record of the said recognizance remaining in the said Court fully appears. And this the defendants are ready to verify by the said record.

Plea to action at the suit of the assignee of the plaintiff that the bond was not assigned by the sheriff. (*o*)

And the defendants, by J. D. their attorney, say, that the said writing obligatory was not, at any time before the commencement of this suit, assigned by the said sheriff to the plaintiff in manner and form as in the said declaration is alleged. And of this the defendants put themselves upon the country, &c.

Plea by bail, that after the commencement of the action, the debt was levied on the principal under a writ of *fieri facias.* (*p*)

And the defendant, by —— his attorney, saith, that the plaintiff ought not further to maintain his action against him, because he saith, that at the time of executing the writ of our lady the queen, of [*testatum*] *fieri facias* hereinafter mentioned, there was due and owing from the said J. F. to the plaintiff, for and on account of the said debt and damages in the said declaration mentioned, the sum of £ ——, and no more; and that after the said affirmance of the said judgment, and the said adjudication of the said Court of Exchequer Chamber, [*this must agree with the facts*], and before the commencement of this suit, to wit, on &c. the plaintiff, for the obtaining the said money then due to him, in respect of the debt, damages, costs and charges aforesaid, caused to be issued out of the said Court of our said lady the queen, before the queen herself, upon the said judgment and adjudication, a certain writ of our lady the queen, called a *testatum fieri facias,* directed to the sheriff of D. against the said J. F., by which said writ our said lady the queen commanded the said sheriff, that of the goods and chattels of the said J. F. in his bailiwick, he should cause to be levied the said sum of £—— which the plaintiff, therein called J. L. clerk, lately in the Court of our said lady the queen, before the queen herself, at Westminster, recovered against the said J. F. for the debt aforesaid, which was adjudged to the plaintiff in the said Court; also the said £—— adjudged to the plaintiff in the Court of Exchequer Chamber, before the justices of the Common Bench and barons of the Exchequer, of the degree of the coif, according to the form of the statute in such case made and provided, for his damages, costs and charges which he had sustained by reason of the delay of the execution of the judgment aforesaid, and by prosecuting the said writ for cause of error brought thereupon by the said J. F. against the plaintiff in the said Exchequer Chamber, and that the said sheriff should have the money before our lady the queen at Westminster, on &c. to render to the plaintiff for his debt and

(*o*) See form, *Dawes* v. *Papsworth*, Willes, Rep. 408; 2 Saund. 61; *Phillips* v. *Barlow*, 6 Car. & P. 781.

(*p*) See Peterdorff on Bail, 367.

On Bail Bonds.

damages aforesaid, and that he should then have there that writ. Upon which said writ afterwards, and before the delivery thereof to the said sheriff, was indorsed according to the course and practice of the said Court, a direction to the said sheriff to levy the sum of £—— besides interest, poundage and officer's fees; and which said writ so indorsed, afterwards and before the return thereof, to wit, on &c. was delivered to ——, then being sheriff of the said county of D. to be executed in due form of law; by virtue of which said writ the said sheriff afterwards, and within eight days last past, to wit, on &c. within his bailiwick, did cause to be levied of the goods and chattels of the said J. F. the said sum of ——, being all the money then due and owing to the plaintiff upon and by virtue of the said judgment and adjudication, and all interest then due thereon, and also the poundage of him the said sheriff and officer's fees, as he was directed by the said indorsement so made on the said writ as aforesaid. And this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought further to have or maintain his said action thereof against him, &c.

Plea by one of the bail, that the bond was taken for ease and favour after return of writ, contrary to the statute 23 Hen. 6, c. 9. (q)

And the defendant, by ——, his attorney, says, that after the making of a certain act of parliament, made and passed in the 23d year of the reign of the lord Henry the Sixth, formerly King of England, to wit, on &c. the said E. F. in the said declaration of the plaintiff named, was arrested at the suit of the plaintiff, under colour of the said writ in the said declaration mentioned, by the said G. H., who then was sheriff of the said county of ——, and the said E. F. was kept and detained by the said sheriff in the custody of him the said sheriff under colour of the said writ, and under the said arrest, for want of his finding bail for his appearance before her said majesty, from the said —— day of ——, A.D. —— aforesaid, and until after the expiration of one calendar month from the time of issuing of the said writ of capias, and until he the defendant, as bail or surety for the said E. F., afterwards, and after the return of the said writ, to wit, on &c. by the said writing in the said declaration mentioned, bearing date the —— day of ——, A.D. —— aforesaid, but in fact sealed by the defendant, and by him delivered as his act and deed, on the said —— day of ——, A.D. —— aforesaid, and not until upwards of one calendar month from the time of issuing the said writ of capias, became bound to the said then sheriff in the said sum of £—— under the condition above mentioned, for ease and favour to be shown by the said sheriff to the said E. F. from his said imprisonment, and from his deliverance therefrom, to be had and obtained; which said writing the said then sheriff then took of the defendant by colour of his said office of sheriff of the said county of ——, contrary to the statute aforesaid, and so the defendant saith, that the said writing so brought here into Court is void in law by force of the said statute. And this the defendant is ready to verify, &c.

(q) See form of pleas of ease and favour, Brownl. Red. 222; 7 Wentw. 613, 614; 1 Saund. 15, 157; 2 Saund. 76; and as to this plea in general, see Com. Dig. Pleader, 2 W. 25; 1 Saund. 163, n. 2; 2 Saund. 60, in notes. It has been usual in precedents of this plea to set forth a great part of the statute, see Lil. Ent. 126; Morg. Prec. 507, and other forms, 7 Wentw. 613, but this is unnecessary, the statute being a public act, 2 T. R. 575; and if it be mis-recited, the mistake will be fatal, Lord Raym. 382; Dougl. 94, 97; 6 T. R. 776; 5 Wentw. 480, n. a. If the bond be void on the face of it, the plea of *non est factum* will suffice, 4 M. & Sel. 338; 2 T. R. 575.

On Bail Bonds.

The mere practice of the Court cannot be pleaded, if the practice does not go to the merits of the defence; such a plea neither avoids nor denies the facts in the declaration. The mode of taking advantage of irregularities in practice, is by application to the Court, or by plea in abatement; 5 Mod. 188; 1 B. & Ald. 393. The defendant could not plead that the cause was out of Court for want of a declaration before the assignment of the bond was taken; 2 East, 442.

Matters of defence in equity, 7 East, 153; 10 East, 377; or merely founded on the discretion of the Court, cannot be pleaded, 2 East, 442; 4 East, 311; 7 East, 153; 2 Campb. 396; thus it cannot be pleaded that the action is brought for the benefit of, or as trustee for, the sheriff's officer, 7 East, 147; and see 1 Lev. 235.

It may be pleaded by bail that the principal was taken under an attachment for non-payment of costs; 2 B. & Ald. 56; 4 Price, 23.

The defendant may, in an action by the assignee of the sheriff, plead generally that the bond was not assigned according to the statute; Willes, 408; 2 Saund. 61, n.

17. On Replevin Bonds.

On Replevin Bonds.

See the precedents of pleas in actions on replevin bonds, 7 Wentw. 621; Willes, 5, 6; 12 East, 585; Morg. 516; *Harrison* v. *Wardle*, 5 Barn. & Adol. 148. Plea, that the suit abated by the death of the plaintiff in replevin, *Morris* v. *Matthews*, 1 G. & D. 679; *Duke of Ormond* v. *Bierley*, Carth. 519. Plea, that the bond was obtained in the name of the sheriff without his authority, *Faulkner* v. *Johnson*, 11 M. & W. 581. As these pleas do not very frequently occur in practice, it is sufficient to refer to the above precedents. Whatever may be a defence to the action, except a mere matter of practice, should be pleaded specially. As to what is a defence, see *ante*, vol. ii. 325, notes; and Wilkinson on Replevin. The Court will, in some cases, in an action on a replevin bond, give relief without plea, 2 B. & B. 107; 4 Moore, 618; as where execution has been issued and levied and paid to avowant before the action on the bond. But the Court will not, in general, set aside the proceedings on the ground that the action is commenced before the condition has been broken, because it will be a good defence to the action; 5 Taunt. 776. Defendant may plead that there was fraud in obtaining the judgment; 2 Marsh. 392; 7 Taunt. 97; 6 Moore, 495.

To a declaration on a replevin bond against the distrainee, alleging that the latter did not appear at the County Court holden next after the making of the bond, and then and there prosecute her suit with effect against the distrainors; plea, that the *distrainors* entered their appearance at the next County Court, and that the suit from thence hitherto has been and still is pending and undetermined, is bad, as not showing that the *distrainee* appeared at the County Court, or was discharged from so appearing; *Rider* v. *Edwards*, 3 M. & G. 202.

18. On Indemnity Bonds.

On Indemnity Bonds.

Non-damnificatus. (r)

After craving oyer of the bond and condition as ante, 174.] The defendant says, that the plaintiff hath not at any time since the making of the said writing obligatory and condition thereof hitherto been in anywise damnified by reason or means of any matter, cause, or thing in the said condition of the said writing obligatory mentioned. And this the defendant is ready to verify, &c.

To declaration in debt on bond to pay money and indemnify, that defendant did pay and indemnify.

And for a further plea in this behalf, the defendant says, that he the defendant did pay the arrears of the said annuity to the said Ann, and every part thereof, and well and sufficiently save, protect, defend, keep harmless and indemnified the said Joseph Walker, his executors and administrators, and his and their goods, estates and effects, from and against the payment of the said sum of money mentioned in the said schedule in the said declaration mentioned, and from and against all actions, suits, claims and demands, for or upon account of the same, according to the tenor and effect, true intent and meaning of the said covenant in the said indenture contained. And of this the defendant puts himself upon the country, &c.

19. On Bonds for Performance of Covenants.

On Bonds for Performance of Covenants.

Performance *generally*, to bond conditioned for performance of acts *therein* mentioned. (s)

After craving oyer (t) *of the bond and condition, and setting out the latter, as ante*, 174.] The defendant says, that he the defendant did (u) from time to time, and at all times after the making of the said writing obligatory and the said condition thereof, well and truly observe, perform, fulfil and keep all and singular the articles, clauses, payments, conditions and agreements in the said condition of the said writing obligatory specified, comprised and

(r) See note to the former precedent, and to the forms, 7 Wentw. 616 to 621; 1 Saund. 115. When the condition of the bond is merely to indemnify, this plea is sufficient; but when the condition stipulates to perform any particular act, performance must be specially pleaded, 1 Saund. 116, n. 1, as in the following precedents, 1 B. & P. 638, 640. Where the plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default, it was held in an action on this covenant that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages; *Loosemore* v. *Rudford*, 9 M. & W. 657. Where to an action on a covenant of indemnity against debts of a third party, assigning a breach in not indemnifying against a debt, the defendant pleaded that the alleged debt in the declaration mentioned was not contracted within the true intent and meaning of the covenant; it was held that the plea was bad, as being a traverse of matter of law; *Summers* v. *Ball*, 8 M. & W. 596. See plea of non-damnificatus in assumpsit on contract of indemnity on execution of a bond, *Jones* v. *Williams*, 7 M. & W. 498.

(s) Where all the covenants, &c. in the bond are in the affirmative, and not in the negative, nor in the disjunctive nor alternative, performance may be pleaded generally in the words of the condition, and the plaintiff must in his replication show a breach; 2 Saund. 410, n. 3; 4 East, 340; Com. Dig. Plead. E. 26; 1 Saund. 116, n. 1; *ante*, vol. i. Index, tit. "*Performance*." See the precedents of performance generally, 7 Wentw. Index, 537; but if there be any thing specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated; 1 Saund. 116, 117, note 1; 4 East, 344; *ante*, vol. i. Index, tit. "*Performance*;" and see *Webb* v. *James*, 7 M. & W. 279.

(t) A defendant cannot plead performance of the condition without craving oyer and setting out the condition *in hæc verba*; 2 Saund. 409, note 2.

(u) In pleading performance generally, the allegations in the plea are usually in the words of the condition, unless the thing to be performed be specific, in which case the time and mode of performance should be specially stated; see *supra*, note (s).

On Bonds for Performance of Covenants.

mentioned, in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory. And this the defendant is ready to verify, &c.

The like to a bond conditioned for the performance as well of *negative* as of *disjunctive* and *affirmative* covenants.

See the notes to the former precedent, and the forms in 3 Wils. 383; Comp. 575, 576; 2 Saund. 409. The plea may be in the following form:—After craving oyer of the bond and condition, containing stipulations not to perform some acts and to perform others, as also stipulations in the disjunctive or alternative, and in the affirmative, and setting out the condition, as ante, 174.] The defendant says, that he the defendant did not &c. [*alleging that defendant did not do any of the acts he stipulated not to perform, and which may be in the words of the condition, see the precedent, 2 Saund. 409, and then proceed to state the defendant's performance of the alternative covenant, according to the fact, which may be as follows:*]—And the defendant in fact saith, that he the defendant, after the making of the said writing obligatory, to wit, on the —— day of ——, A. D. ——, did &c. [*Here state the performance by the defendant of the alternative covenant, i. e. that he did one or other of the acts which he had the option to perform, and then state generally the defendant's performance of the affirmative covenants as follows:*]—And the defendant further saith, that he the defendant did from time to time, and at all times after the making of the said writing obligatory, well and truly observe, perform, fulfil and keep, all and singular the other articles, clauses, payments, conditions and agreements, in the said condition of the said writing obligatory specified, comprised or mentioned in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory. And this the defendant is ready to verify, &c.

Observance of the *negative* covenants.

Performance of the *alternative* or *disjunctive* covenant.

Performance of the *affirmative* covenants.

Performance generally, to debt on bond conditioned for performance of covenants *in an indenture.* (*x*)

After craving oyer of the bond and condition, and setting out the latter, which was for the performance of covenants in an indenture.] The defendant says, that the said indenture, [*or*, "articles of agreement," &c. *according to the fact*] in the said condition of the said writing obligatory mentioned, was and is a certain indenture, [*or*, "articles of agreement," &c.] made heretofore, to wit, on the —— day of ——, A. D. ——, between the plaintiff of the one part, and the defendant of the other part, and which said indenture, sealed with the seals of the plaintiff and defendant respectively, and bearing date the same day and year aforesaid, is now in the custody, possession or power of the plaintiff, and therefore he the defendant cannot produce the same here in Court, and which said indenture is as follows: [*here copy the indenture verbatim to the end of the words* "in witness, &c."] (*y*) as by the

(*x*) See forms, 1 Saund. 52 to 56; 3 Wils. 381 to 385, and 7 Wentw. 537; Co. Ent. 130, 134; 1 Saund. 10, n. 1; Lil. Ent. 115, 116, 118, and the notes to the preceding forms. The *whole* of the indenture referred to in the condition ought in strictness to be set forth, as in the precedents; 1 Saund. 52 to 55. See 4 East, 344, note 4, and 345, 346; 1 Saund. 316, 317, note 2, 9, note 1; 2 Saund. 409, note 2; and the defendant cannot crave oyer of such indenture, though it be in the hands of the plaintiff, though the Court will compel the plaintiff to give a copy of the indenture to the defendant, where he has not one part in his possession; 1 Saund. 8, 9.

(*y*) Sometimes the precedents do not state the whole deed, but only the parts containing the covenants, thus, "whereby the said A. B. demised," &c. [*setting it out according to the legal effect, and concluding, after reference to the lease, as follows:*] "and which said cove-

said indenture, reference being thereunto had, will fully appear; and the defendant further saith, that the defendant hath always, since the making of the said writing obligatory, hitherto well and truly observed, performed, fulfilled and kept, all and singular the covenants, articles, clauses, provisoes, conditions and agreements in the said indenture comprised and mentioned, which on the part and behalf of him the defendant and his assigns were or ought to be observed, performed, fulfilled or kept, according to the true intent and meaning of the said indenture. And this the defendant is ready to verify, &c.

The like in a more concise form. (s)

After craving oyer of the bond and condition, and setting out the latter, as ante, 174.] The defendant says, that there was not nor is there any negative or disjunctive covenant or agreement contained or specified in the said indenture in the said condition of the said writing obligatory mentioned, on the part and behalf of the defendant to be omitted, done, observed, performed, fulfilled or kept; and that he the defendant hath well and truly performed, fulfilled and kept, the said last-mentioned indenture, and all things therein contained, on his part and behalf to be observed, performed, fulfilled and kept, according to the true intent and meaning thereof. And this the defendant is ready to verify, &c.

Performance *specially*.

See the precedents, 1 Saund. 145, 146; 3 Wils. 383; and 5 Wentw. 537, 538. The form of this plea is precisely similar to the four preceding precedents, except in the mode of stating the performance, which must necessarily be according to the fact of each particular case, and may be in substance as in the precedents above referred to.

Excuse of performance. (a)

After craving oyer of the bond and condition, and setting out the latter, as *ante*, 174, and if the bond be conditioned for the performance by the defendant of covenants in an indenture, &c. stating such indenture, pleas of this nature state the matter of excuse for the defendant's non-performance, and conclude with a verification; see the precedent, 1 Saund. 100, of a plea to debt on bond, conditioned to account for monies, &c. that no money, &c. came to the defendant's hand, and see 3 East, 485, where the death of one of several obligees was pleaded to debt on a bond to account for monies received by the defendant for the deceased and the other obligees. The following plea of non-performance by the plaintiff of a condition precedent may serve as a general precedent as to the mode of arranging the different allegations. See form of plea showing that the event on which defendant

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nant and matters hereinbefore set forth are all the covenants, grants, articles, clauses, provisoes, payments, agreements, and conditions, which on the part and behalf of the said E. F. were and ought to be observed, performed and fulfilled, according to the said indenture."

(s) As to this form of pleading, see 4 East, 345; and 1 Saund. 317, note 2; and vol. i. Index, tit. "*Performance*." It is questionable whether this form will suffice; it has frequently been adopted in practice where the indenture referred to in the condition is very long. If there be a negative or disjunctive covenant, the plea may state that the indenture contained the same, and aver that there was no other such covenants, and show performance thereof, and conclude as above, stating the general performance of the affirmative covenants.

(a) When a surety cannot plead an indulgence to the principal, see 10 East, 35. As to the validity of and mode of framing plea to debt on bond conditioned for the fidelity of the defendant as clerk to the plaintiffs; that the nature of the defendant's duties were subsequently changed and that he ceased to be clerk, see *Anderson* v. *Thornton*, 2 G. & D. 502.

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was to pay has not happened held good on demurrer, *Beswick* v. *Swindells*, 5 Bar. & Adol. 914.

Plea in excuse of performance, that defendant was ready and willing to have produced a good title upon plaintiff's paying the purchase-money, but that the plaintiff discharged him wholly therefrom. (*b*)

After craving oyer, &c.] The defendant says, that he the defendant, before the said —— day of &c. in the said agreement mentioned, to wit, on &c. was ready and willing and offered to the plaintiff to produce a clear and perfect title in the law of and in the said messuages and tenements, and to execute a proper conveyance thereof to the plaintiff, to hold to him the plaintiff, his heirs and assigns for ever, upon his the plaintiff's paying to the defendant the full sum of £—— as and for the purchase-money thereof, whereof the plaintiff then had notice; but that the plaintiff then required the defendant not ever (*c*) to produce the same, or to execute the said conveyance to the plaintiff, and the plaintiff then forbid the defendant then or ever so to do; and the plaintiff then declared to the defendant that he would not nor did he ever pay to the defendant the said sum of £—— &c. as for the said purchase-money, and the plaintiff then wholly declined and disavowed, and discharged the defendant from the carrying of the said agreement in the said declaration mentioned into execution, for which reason and no other the defendant did not, upon or before the said —— day of &c. produce, nor hath he at at any time since hitherto produced, a clear and perfect or other title in the law of and in the said freehold messuages and tenements and premises, or any part thereof, to him the plaintiff, to hold the same to him the plaintiff, his heirs and assigns for ever, according to the tenor and effect, true intent and meaning of the said agreement in that behalf. And this the defendant is ready to verify, &c.

Non-performance by plaintiff of a condition precedent.

After craving oyer of the bond and condition, and setting out the latter, as ante, 174, *or if the bond be conditioned for the performance of covenants in an indenture, and the plaintiff has neglected to perform a condition precedent therein, then set forth the indenture and the reference thereto, as in the precedent, ante*, 196, *and then state the plaintiff's non-performance as follows:*] And the defendant, as to the said covenant in the said indenture contained, that he the defendant would, during the continuance of the said demise, repair and keep in repair the said demised premises, with the appurtenances, being allowed timber in the rough, sufficient and proper for such repair, from time to time to be provided and set out by the plaintiff, his heirs and assigns [*this is to be according to the words of the particular covenant qualified by the condition precedent*], the defendant saith, that at the time of the making of the said demise the said premises were ruinous, prostrate and in great decay, for want of needful and necessary reparation and amendment thereof, and that after the making the said indenture, to wit, on the —— day of ——, A. D. ——, there was need and occasion for a large quantity, to wit, —— loads of timber in the rough, to repair the said demised premises with the appurtenances; and the defendant then requested the plaintiff to allow him the defendant timber in the rough, sufficient and proper for the repair of the said demised premises with the appurtenances, and to provide and set out the same accordingly, yet the plaintiff did not, nor would, when he was

(*b*) See Dougl. 684.

(*c*) This form was drawn by an eminent pleader, but it seems an awkward mode of stating the facts.

so requested as aforesaid, or at any time before or since, allow to him the defendant timber in the rough, sufficient or proper for the repair of the said demised premises with the appurtenances, or provide or set out the same, but then wholly neglected and refused, and hath thence hitherto wholly neglected and refused so to do; and the defendant further saith, that he the defendant hath always, since the making the writing obligatory, well and truly observed, performed, fulfilled and kept, all and singular other the covenants, articles, clauses, provisoes, payments, conditions and agreements, in the said indenture comprised and mentioned, which on the part and behalf of him the defendant and his assigns were or ought to be observed, performed, fulfilled or kept, according to the true intent and meaning of the said indenture. And this the defendant is ready to verify, &c.

20. On Charter-parties.

To a declaration in debt on a charter-party, for a penalty for not shipping a cargo of fruit at St. Michael's, that the plaintiff's ship was so unseaworthy and badly tackled, that in consequence the ship was delayed in her outward voyage, and did not arrive in reasonable time at St. Michael's to receive cargo on board. (*d*)

And for a further plea in this behalf, the defendant saith, that although he the defendant, for a reasonable time after the making of the said charter-party, was ready and willing, at St. Michael's aforesaid, to load and put on board such ship or vessel a cargo according to the meaning and effect of the said charter-party; yet the defendant in fact saith, that the said ship was not, at the commencement of the said voyage, seaworthy, and during the said voyage was not kept staunch, tight and strong, well manned, victualled, tackled and provided in every respect fit for performing the said voyage, according to the said charter-party, but on the contrary thereof the tackle of the said ship or vessel, during the said voyage, was wholly insufficient and unfit for performing the said voyage, contrary to the meaning and effect of the said charter-party; and by reason thereof the said ship or vessel, during the said voyage, was greatly delayed in performing her said voyage, and did not arrive at St. Michael's aforesaid for a great and unreasonable length of time after the making of the said charter-party, to wit, until the —— day of ——, in the year of our Lord ——, and thereby divers large quantities of fruit, which he the defendant had before then provided and had ready at St. Michael's aforesaid, in order that the same might be shipped and loaded at St. Michael's aforesaid, on board of the said ship as her cargo, in pursuance of the said charter-party, became and were perished and wholly destroyed,

(*d*) See other pleas to charter-parties, 3 East, 233; *Crozier* v. *Smith*, 1 M. & G. 407; and pleas in assumpsit to an unsealed memorandum of charter-party, *Galloway* v. *Jackson*, 3 M. & G. 960; *Pringle* v. *Mollett*, 6 M. & W. 80, and *post*, in Covenant. To a declaration in assumpsit against the freighter on a charter-party, charging a detention on demurrage for fourteen days and a general detention beyond, a plea that at the time when the said vessel was unloading, as in the declaration mentioned, the plaintiffs wrongfully stopped the unloading thereof and prevented the defendant from unloading the same, is bad; for although the owners cannot exercise an arbitrary power of selecting on what days the unloading shall take place, or of interrupting capriciously that operation, yet any interference, for however short a time, by the owners, to prevent an unloading within the running days and days of demurrage, will not put an end to the obligation of the charter-party; *Benson* v. *Blunt*, 1 G. & D. 449. To an action by the owner against the charterer for not discharging the cargo within the time mentioned and detaining the vessel, whereby a demand arose for demurrage, see pleas denying the detainment, and that the defendant was prevented from unloading by the wrongful act, neglect and default of the plaintiff, his servants and agents, *Brown* v. *Johnson*, 11 M. & W. 331. As to the mode of calculating the number of lay days at the port of discharge, see *Brown* v. *Johnson*, 10 M. & W. 331; *Kell* v. *Anderson*, 10 M. & W. 498.

ON CHARTER-PARTIES.

and thereby he the defendant was hindered and prevented from shipping and loading on board the said ship or vessel such a cargo as aforesaid. And this the defendant is ready to verify, &c.

Same plea more concise.

And for a further plea in this behalf, the defendant says, that the said ship, in the said charter-party mentioned, was not, at the commencement of the said voyage, and was not during the same voyage, kept staunch, tight and strong, well manned and victualled, tackled and provided, in every respect fit for merchants' service, and particularly for performing the said intended voyage in the said charter-party mentioned, whereby, and not by reason of any of the perils or other causes in the said charter-party mentioned, the said ship was prevented from arriving at St. Michael's aforesaid within a reasonable time for receiving a cargo from the plaintiff or his agents there, according to the true intent and meaning of the said charter-party. And this the defendant is ready to verify, &c.

Plea to declaration at suit of the owner of a ship against the freighter for a penalty incurred by breach of the charter-party, that the ship did not stay at loading port sixty-five running days and ten more.

And for a further plea in this behalf, the defendants say, that the said ship did not stay and continue at the said ports of L. and S. respectively for the space of sixty-five running days, or any number of days, nor for the space of ten days, or any number of days after the expiration of the said sixty-five days, in manner and form as the plaintiff hath above in his declaration alleged. And of this the defendants put themselves upon the country, &c.

Plea, that defendants were ready to load a cargo, and offered to do so, but plaintiff refused to receive it.

And for a further plea in this behalf, the defendants say, that after the arrival of the said ship off S. as in the said declaration mentioned, and within the space of sixty-five days, and ten days after the expiration of the said sixty-five days from the arrival of the said ship at the said last-mentioned port, to wit, on the &c. at S. aforesaid, they the defendants did offer and tender goods and merchandizes to load on board the said ship, to be carried by the same from the said port of S. on her return to the port of London, as it was lawful for them so to do, according to the purport and true intent of the said charter-party of affreightment, but which said goods and merchandize the plaintiff then refused to receive on board the said ship there for her homeward-bound voyage, and to sail homeward to the port of London, according to the form and effect of the said charter-party. And this the defendants are ready to verify, &c.

Plea, that defendants did load a cargo abroad.

And for a further plea in this behalf, the defendants say, that after the arrival of the said ship at the said port of S. as in the said declaration mentioned, and within the space of sixty-five running days, and ten days after the expiration of the said sixty-five running days from the arrival of the ship at the said last-mentioned port, to wit, on &c. at &c. they the defendants did, during the said time of the said ship being at L. and S. load and dispatch the said ship at and from the said port of L. and S. respectively, with divers goods and merchandizes to be carried from thence to London, according to the form and effect of the said charter-party. And of this they put themselves upon the country, &c.

Plea, that ship departed before the expiration of the appointed time.

And for a further plea in this behalf, the defendants say, that after the arrival of the said ship at the said port of S. as in the said declaration is mentioned, and within the space of sixty-five running days, and ten days after the expiration of the sixty-five running days from the arrival of the said ship at the port of S. last-mentioned, to wit, on &c. aforesaid, the said ship, before the same could be loaded by the defendants, without the consent and in despite of the defendants, did quit the said port of S. and depart to places unknown to the defendants. And this the defendants are ready to verify, &c.

Plea in similar action, that the ship did not sail from England by the day specified in the charter-party. (e)

And for a further plea in this behalf, the defendants say, that although the said vessel was required by the said charter party to sail from England on or before the —— day of —— next after the making of the said charter-party, yet the said vessel did not sail from England on or before the said —— day of ——, but, on the contrary thereof, the said vessel remained and continued in England, without the leave or license and against the will of the defendants, for a long time after the said —— day of ——, to wit, until and upon the —— day of ——, in the year aforesaid. Whereupon the defendants then refused to perform and fulfil the said charter-party, as they lawfully might do for the cause aforesaid. And this the defendants are ready to verify, &c.

To action by charterers against executors of the owner of the vessel for breach of charter-party in refusing to load ship and convey the cargo from Bombay to Calcutta, plea that the deceased was ready and willing, having discharged a cargo at Bombay, to take a new cargo for London, but refused to carry a cargo to Calcutta, that port not being a port of discharge within the meaning of the charter-party. (f)

And for a further plea in this behalf, the defendants say, that from the time of the arrival of the said ship at Bombay aforesaid, and the discharge of her outward cargo as in the declaration mentioned, and from thence continually until the said ship proceeded from Bombay, as therein also mentioned, the said H. W. was ready and willing, and during that period, to wit, on the —— day ——, A. D. ——, offered and tendered to the plaintiffs to load and receive on board the ship a full and complete cargo of lawful merchandize, to be conveyed in the said ship according to the charter-party, to wit, to London. And the defendants say, that the cargo of lawful merchandize, which in the said declaration the said H. G. is alleged to have been required to load on board the said ship at Bombay aforesaid, was to be conveyed to and discharged at a certain port or place other than London or any dock in the river Thames, to wit, Calcutta, contrary to the charter-party, and on that account and no other the said H. W. refused to load the said cargo on board the said ship. And the defendants further say, that from the time of the arrival of the said ship at Bombay, and from thence continually until she sailed from Bombay, as in the declaration mentioned, the plaintiffs wholly neglected and refused to load on board the said ship a full and complete cargo, or any part of a cargo, of merchandize, to be conveyed to London, and there, or in any dock in the river Thames, to be discharged, and afterwards discharged the said H. W. from any further detaining or keeping the said ship at Bombay aforesaid; whereupon the said ship proceeded from Bombay without any cargo on board, in manner

(e) See *Glaholm* v. *Hays*, 2 M. & G. 257. *Wright*, 6 Bing. N. C. 228; 8 Dowl. 260, S.C.

(f) See declaration and plea, *Cockburn* v.

On Charter-parties.

and form as the plaintiffs have thereof above alleged. And this the defendants are ready to verify, &c.

21. On Leases and Tenancies.

On Leases and Tenancies.

Observations.]—Defendant may plead *non est factum* or traverse the tenancy when not created by deed. *Riens in arrere* was formerly pleaded in debt but not in covenant; Cowp. 588; 1 Rich. C. P. 500. But since Reg. Gen. Hil. T. 4 W. 4, *riens in arrere* would be demurrable to debt. *Nil habuit* is a bad plea to debt for use and occupation; *Curtis* v. *Spitty*, 1 Bing. N. C. 15. As to the words "*et issint nil debet*," see Gilb. Debt, 440; Bro. Dette, pl. 113, p. 123.

Plea that lessee was an alien artificer, and therefore the lease was void.

See form in *Jevens* v. *Harridge*, 1 Saund. 5. See also *Lapierse* v. *M'Intosh*, 9 A. & E. 857; 1 P. & D. 629, S. C.

Plea to debt against an alleged assignee of a lease, that he is not assignee. (*g*)

And the defendant, by Y. Z. his attorney, saith, that all the estate, right, title and interest of the said E. F. [*the named lessee*] of and in and to the said demised land and premises, with the appurtenances, by assignment thereof made, did not come to or vest in the defendant in manner and form as the plaintiff hath in his said declaration alleged. And of this the defendant puts himself upon the country, &c.

Eviction. (*h*)

And the defendant, by ——, his attorney, saith, that the plaintiff, after the making of the said indenture, and before any part of the said rent in the said declaration mentioned became due and payable, to wit, on &c. with force and arms &c. entered into and upon the said demised premises, and

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(*g*) *Custis* v. *Spitty*, 1 Bing. N. C. 756.

(*h*) See the form and note, 1 Saund. 204, note 2; Gilb. Evidence, by Loft, 355; Bac. Abr. Rent, L.; and as to an eviction from *part* of the premises, and the necessity for the tenant quitting the remainder, see *id.* 3 Camp. 513, 14, n.; and a plea of fraud and abandonment of contract as soon as discovered; and a plea of eviction by a stranger, Morg. 468. See also a plea in bar in replevin of an eviction, *post.* A lessor granting more land than he is entitled to, operates as an eviction to that part to which he has no title, see 5 Moore, 566. But where the lessee of 100 acres of land for one year accepted the lease and entered upon the land, and upon his entry found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half a year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in the possession of the remainder; it was held, on error (reversing the judgment of the Court of Exchequer), that the latter demise was wholly void as to the eight acres, and that the rent was not apportionable; *Neale* v. *Mackenzie*, 1 M. & W. 747.

The plea of eviction has not the same force with respect to other covenants which it has in answer to a breach of covenant to pay rent, and therefore eviction from part of the demised premises is no answer to an action for breaches of covenant to repair, nor to underlet, &c.; *Newton* v. *Allin*, 1 G. & D. 44. A declaration alleging an eviction as a breach of a covenant for quiet enjoyment, must not leave it matter of doubt whether the evictor might not have come in under title from the plaintiff himself; *Brookes* v. *Humphreys*, 5 Bing. N. C. 55.

This plea is sufficient, though the demise were by deed; 2 Saund. 297, note 1; 2 Ld. Raym. 1503. As to this plea in general, see 1 Saund. 204, n. 2. In debt for rent, an eviction might have been given in evidence under the general issue, but in covenant it must always have been pleaded; 1 Saund. 204, n. 2; and now it must be pleaded in all actions.

A plea to assumpsit for use and occupation, that the defendant held the premises under a demise from the plaintiff at a certain rent, payable quarterly, and that before the rent became due the plaintiff evicted him from the possession of the premises, is bad, as amounting to the general issue; *Prentice* v. *Elliott*, 5 M. & W. 606.

then ejected, expelled, put out and amoved the defendant from the possession thereof, and kept and continued him the defendant so ejected, expelled, put out and amoved from thence hitherto. And this the defendant is ready to verify, &c.

Another plea to an action for rent, that defendant was evicted during the term charged.

And for a further plea in this behalf, as to the said sum of £——, parcel &c. as aforesaid, the defendant says, that this action is brought to recover the said sum of £——, parcel &c. for and in respect of one quarter's rent of the said rooms and apartments, commencing from the —— day of ——, A. D. ——, and ending on the —— day of —— in that year, for the use and occupation thereof by the defendant during that time as the plaintiff's tenant, and that the said rooms and apartments were let to the defendant by the plaintiff, and the defendant held the same at the quarterly rent of £——, and each quarter's rent being payable on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, in every year of the said tenancy respectively. And the defendant further says, that the plaintiff, during the said tenancy, *and before the last-mentioned sum of £ ——, parcel &c. accrued due, to wit, after the said —— day of ——*, A. D. ——, and before the said —— day of —— in the same year, to wit, on the —— day of ——, A. D. ——, with force and arms entered into and upon the said rooms and apartments, and then ejected, expelled, put out and amoved the defendant from the possession thereof, and kept and continued him the defendant so ejected, expelled, put out and amoved from thence until and upon the —— day of —— hitherto. And this the defendant is ready to verify, &c.

Plea to debt for rent against administratrix, an *eviction* by plaintiffs.

And for a further plea in this behalf, as to the non-payment of the said sum of £——, parcel of the said sum of money in the declaration first mentioned, the defendant says, that the said sum of £—— is claimed by the plaintiff to be due to him from the defendant as administratrix as aforesaid, for one year's rent of a house and premises situate near a certain place called D. Down, up to the 29th day of September, A. D. 1831, alleged by the plaintiff to have been held by the said J. M. And the defendant further says, that the said J. M. held the said house and premises as tenant thereof to the plaintiff at the rent aforesaid, the same being payable half-yearly; and that afterwards and whilst he so held the same, and before any part of the said rent of £—— became due to the plaintiff, to wit, on the —— day of ——, A. D. ——, he the plaintiff with force and arms &c. entered into and upon the said house and premises, and then ejected, expelled, put out and amoved the said J. M. from the possession and occupation thereof, and kept and continued him the said J. M. so ejected and expelled, put out and amoved from thence until long after the said —— day of ——, in the year of our Lord ——, and until the death of the said J. M. And this the defendant is ready to verify, &c.

Plea to action for rent due for turnpike tolls, that before it became due the trustees evicted the defendant. (i)

See *Palmer* v. *Gooden*, 7 M. & W. 486; 8 M. & W. 890; 1 Dowl. N. S. 674, S. C.

(i) In an action of debt by a trustee of a turnpike-road against a lessee of tolls, a plea that after the demise to the defendant, and before any rent became due, the stat. 3 & 4 Vict. c. 33, was passed, which took away certain of the tolls, and therefore the lease was void, was held bad on general demurrer; *Harris* v. *Morrice*, 10 M. & W. 260.

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Plea that the defendant gave up possession to the plaintiff with his consent. (*k*)

And for a further plea in this behalf, the defendant says, that the plaintiff claims and seeks to recover the said sum of £——, being the sum above demanded and alleged to be due to the plaintiff for the rent of the said messuage and tenements in the said declaration mentioned, for the space of [two years and one quarter of a year,] ending upon the [25th day of March,] A. D. ——, as in the said declaration mentioned. And the defendant says, that he held the said messuage and tenements at the said rent of £——, payable quarterly on the days and at the times in that behalf in the declaration mentioned. And the defendant further says, that before the said sum of £—— above-mentioned or any part thereof accrued or became due, and more than [two years and a quarter] before the said [25th day of March,] A. D. ——, being the day when the said sum of £—— is supposed to have been due and payable to the plaintiff, and before the [25th day of December,] A. D. ——, to wit, on the —— day of ——, A. D. ——, it was agreed by and between the plaintiff and the defendant, that the defendant should quit and deliver up to the plaintiff, and that the plaintiff should take possession of the said messuage and tenements before the said [25th day of December,] A. D. ——, and that in consideration thereof the defendant should be discharged from all liability to pay any further rent or any other compensation which would otherwise become due for the occupation of the said messuage and tenements after the said [25th day of December] A. D. ——. And the defendant further says, that in pursuance of the said agreement, he the defendant afterwards, to wit, on the said —— day of ——, 18——, being before the commencement of this suit, and before the said sum of £—— or any part thereof accrued or became due, and more than [two years and a quarter] before the said [25th day of March] A. D. ——, and before the said [25th day of December] A. D. ——, did quit and deliver up possession of the said messuage and tenements to the plaintiff, and the plaintiff then accepted such possession thereof, in pursuance and on the terms of the said agreement and in discharge of the liability of the defendant to pay any more or further rent or compensation for the said messuage and tenements in the declaration mentioned; and thereupon the plaintiff then, to wit, on the said —— day of ——, 18—, accordingly entered into and upon the said messuage and tenements, and thenceforth hitherto hath remained and continued in possession thereof; and the defendant hath not at any time since he so quitted and gave up possession of the said messuage and tenements held, used or enjoyed the same; and the defendant avers that the said tenancy and the defendant's said interest were thereby then surrendered and extinguished. And this the defendant is ready to verify, &c.

Plea by lessee that he assigned the term to a third person, whom the plaintiff accepted as tenant. (*l*)

And for a further plea in this behalf, the defendant says, that after the

(*k*) It was held that on this plea the objection did not arise, whether the term was shown upon the record to be regularly surrendered according to the statute of frands, 29 Car. 2, c. 3, s. 3, the defence being merely an executed contract, that in consideration of the defendant's giving up possession, the plaintiff should abandon his claim to the rent, and that such defence was valid; *Gore* v. *Wright*, 8 A. & E. 118; 3 N. & P. 243, S. C.

(*l*) See the forms, 2 Saund. 297, 298; 7 Wentw. 625. Where rent has been accepted of an assignee, the lessee cannot be sued in *debt*, but only in *covenant*, if the demise were by deed; or in assumpsit, if the demise were by parol, *ante*, vol. i. Index, "*Lease*;" 1 Saund. 241, 242, n. 5. *Quære*, if it should not be shown in a *plea* that the assignment was signed according to the Statute of Frauds, 1 Saund. 276, n. 2; 2 Saund. 297, notes 1 and 2; Sir T. Raym. 451. This plea is not available in covenant for rent; 4 Taunt. 642.

making of the said demise in the declaration mentioned, and before any part of the said rent therein mentioned became due or payable, to wit, on &c. he the defendant, by a certain indenture of assignment, by him then made and duly signed by the defendant and sealed with his seal, for the consideration therein mentioned, did bargain, sell, assign, transfer and set over unto G. H. his executors, administrators and assigns, all the right, title, interest, term of years then to come and unexpired, property, claim and demand whatsoever of him the defendant, of, in and to the said demised premises, with the appurtenances, to have and to hold &c. [*as in the words of the assignment*] by virtue of which said indenture of assignment the said G. H. afterwards, to wit, on the day and year last aforesaid, entered into the said demised premises, with the appurtenances, and became and was thereof possessed for the residue of the said term then to come therein and unexpired, whereof the plaintiff on the day and year last aforesaid had notice; (*m*) and the defendant further saith, that the plaintiff, after the entry of the said G. H. into the said demised premises, with the appurtenances, under and by virtue of the said assignment, to wit, on &c. did accept and receive of and from the said G. H. as tenant to the plaintiff, a large sum of money, to wit, the sum of £—— for the rent aforesaid, in form aforesaid, reserved and then made payable, and then accepted the said G. H. as his tenant of the said demised premises, with the appurtenances. And this the defendant is ready to verify, &c.

Plea by an assignee that he assigned over his interest before any rent became due.(*n*)

And for a further plea in this behalf, the defendant says, that after he the defendant became assignee of the said demised premises as in the declaration mentioned, and before any part of the said rent in the said declaration mentioned became due or owing to the plaintiff, to wit, on &c. he the defendant, by a certain indenture of assignment, then made and duly signed by him and sealed with his seal, for the consideration therein mentioned, did &c.—[*State the assignment to the third person and his entry, as in the former precedent, and conclude with a verification.*]

Plea to an action of debt for rent of apartments that the plaintiff and family disturbed the defendant in his possession, and obliged him to leave the house.(*o*)

And for a further plea as to the sum of £—— parcel &c. the defendant says, that this action is brought to recover the said sum of £—— parcel &c. for and in respect of a quarter's rent of the said rooms and apartments, commencing on the &c. and ending on the &c. for the use and occupation thereof by the defendant during that time as the plaintiff's tenant. And the defendant further saith, that the said rooms and apartments were part and parcel of a certain house and premises in which the plaintiff and his family resided; and that the said rooms and apartments were let to the defendant by the plaintiff, and the defendant held the same at the quarterly rent of £——, each quarter's rent being payable on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December,

(*m*) 1 Sid. 338.

(*n*) See 2 Stra. 1221; 1 B. & P. 21. It is not necessary to aver notice of the assignment; Bac. Abr. Covenant, E. 4; 2 Vent. 234; Sid. 339. The assignee of a lease is liable for the breach of a covenant running with the land incurred in his own time, though the action is not commenced until after he has assigned the premises; *Harley* v. *King*, 2 Cr. M. & Ros. 18.

(*o*) As to the rights of a lodger and his landlord, see *Underwood* v. *Burrows*, 7 Car. & P. 26.

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in each year of the said tenancy respectively, and at the times the said rooms and apartments were so let to the defendant, *he the plaintiff agreed with and promised the defendant to suffer and permit him the defendant and his family to use and occupy the said rooms and apartments in a peaceable and quiet manner, and without molestation or disturbance by the plaintiff or his family*, and that he the plaintiff would not render the same uncomfortable to the defendant and his family during the said tenancy. And the defendant further says, that during the said tenancy and before the —— day of ——, A.D. ——, to wit, on the —— day of March, A.D. ——, and on divers other days and times before the —— day of ——, A.D. ——, the plaintiff and his family greatly molested and disturbed the defendant and his family then residing in the said rooms and apartments, in the use, occupation, possession, and enjoyment of the said rooms and apartments, and rendered the same uncomfortable to the defendant and his family to use or occupy the said rooms and apartments in a quiet and peaceable manner, and thereupon it was reasonable and expedient that the defendant should quit, and he was obliged to leave, and thereupon, before the said sum of £—— became due, to wit, after the said —— day of ——, A.D. ——, and before the —— day of ——, A.D. ——, to wit, on the —— day of ——, A.D. ——, he the defendant did quit the said rooms and apartments, and hath not at any time since held and enjoyed or occupied the same, and the plaintiff then had full power and liberty to enter thereon, of all which he then had notice. And this the defandant is ready to verify, &c.

And thereupon defendant justly quitted before any rent became due.

To action for nonpayment of rent of a house and premises under an agreement, plea that through the neglect of the plaintiff the house became in a bad state and condition and insecure and uninhabitable. (*p*)

And for a further plea in this behalf, the defendant says, that before the commencement of the period in respect of which the rent was claimed, to wit, on the —— day of ——, A.D. ——, the said house and premises, by means and in consequence of age and natural decay, and the badness of the materials thereof, and the bad and improper manner in which they were originally built, and the rotten, foundrous, miry and insecure state and condition of the walls, timbers and foundations thereof, and for want of good and sufficient sewerage and drainage, and by and through the neglect and default of the plaintiff (*q*), and not for want of any such repair as the defendant was bound to do under or by virtue of the said agreement, or by or through any neglect or default of the defendant in that behalf, became and were in a ruinous, bad, insecure and dangerous state and condition, and wholly unsafe and unfit for habitation, whereof the plaintiff then had notice, and was then requested by the defendant to put the said house and premises into a safe, habitable and tenantable repair, and a fit state and condition to enable the defendant to continue to inhabit and reside therein in safety, which the plaintiff then wholly neglected and refused to do. And the defendant further says, that after allowing the plaintiff a reasonable time to put the premises into such a state, and before the commencement of the period in respect of which the rent was claimed, to wit, on the —— day of ——, 18—, the defendant quitted and left the said house and premises, and relinquished and gave up the possession thereof to the plaintiff, and has not at any time since used or occupied the same, or

(*p*) See *Arden* v. *Pullen*, 10 M. & W. 321. See "*Replication*," *post*. *Quære*, the goodness of this plea.

(*q*) The plea would be bad without this averment, *per* Lord Abinger, 10 M. & W. 327.

any part thereof, or derived any benefit therefrom. And this the defendant is ready to verify, &c.

See precedent and decision in *Wilkinson* v. *Hall*, 1 Bing. N. C. 716.

Plea to declaration by tenants in common against parties holding over after notice and demand, that defendant did not hold of plaintiffs under a *joint* demise from them.

Plea to debt for rent against administratrix that there were disputes as to an agreement, &c. for plaintiff's repairing the premises, and that to put an end to them it was agreed defendant should give up the premises and tenancy &c.

And for a further plea in this behalf, as to the non-payment of a certain sum of money, to wit, £——, parcel of the said sum of money in the declaration first mentioned, the defendant says, that the said sum of £—— is claimed by the plaintiff to be due to him from the defendant, as administratrix as aforesaid, for one year's rent of a house and premises, situate near a certain place called Durdham Down, up to the —— day of —— in the year of our Lord ——, alleged by the plaintiff to have been held by the said J. M. And the defendant further says, that long before any part of the said supposed rent accrued due, to wit, on the —— day of ——, A.D. —— it was agreed between and by the plaintiff and the said J. M. in his lifetime, that the said J. M. should become yearly tenant to the plaintiff of the said house and premises, to wit, from Michaelmas then next, that is to say, Michaelmas in the year of our Lord ——, at a certain yearly rent, to wit, the yearly rent of £——, payable at certain times, to wit, half-yearly, during such tenancy, and that the plaintiff should convert a certain slaughter-house, being parcel of the said premises, into a stable or out-house, and should put and keep the said house and premises respectively in tenantable repair and condition, except the glass of the windows. And the defendant further says, that at the time of the making of the said agreement, the said house and premises were in bad and untenantable repair and condition, and so remained and continued until Michaelmas then next, and also up to the time of the relinquishing and giving up possession thereof by the said J. M. as hereinafter mentioned. And the defendant further says, that at Michaelmas then next, to wit, on the —— day of ——, A.D. ——, being the commencement of the said year in respect of which the said rent is claimed by the plaintiff as aforesaid, the said J. M. confiding in the said agreement, and that the plaintiff would forthwith convert the said slaughter-house into a stable or out-house, and put the said house and premises into tenantable repair and condition, except as aforesaid, entered into the said house and premises respectively, and then requested the plaintiff to convert the said slaughter-house into a stable or out-house, and to put the said house and premises into a tenantable repair and condition as aforesaid, but the plaintiff then wholly neglected and refused so to do, and the said slaughter-house still remaining unconverted into a stable or out-house, and the said house and premises respectively still continuing in such bad and insufficient and untenantable repair and condition, he the said J. M. for that reason and no other, afterwards and after allowing a reasonable time to the plaintiff to do the several matters aforesaid, and before any part of the said supposed rent or sum of £—— became due and payable, to wit, on the —— day of ——, A.D. ——, relinquished and gave up possession of the said house and premises respectively to the plaintiff. And the defendant avers that the said J. M. having quitted and relinquished the possession of the said house and premises as aforesaid, afterwards, to wit, before any part of the said rent

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of £—— became due, (that is to say), on the —— day of —— A.D. ——, disputes and differences arose between and by the plaintiff and the said J. M. touching the said house and premises and the non-repair of the same by the plaintiff as aforesaid, and the non-conversion of the said slaughter-house into a stable or out-house as aforesaid, and touching the quitting and relinquishing the possession of the said respective premises by the said J. M. as aforesaid; and for the purpose of ending such differences and disputes, he the said J. M. then, to wit, on the day and year last aforesaid, paid to the plaintiff a certain sum of money, to wit, £5, in full satisfaction and discharge of all claims and demands of the plaintiff on the said J. M. in respect of the said house and premises and the rent thereof, and all damages touching the same, and the plaintiff then accepted the said last-mentioned sum of money in full satisfaction and discharge thereof respectively, and for the purpose of ending such differences and disputes as aforesaid. And this the defendant is ready to verify, &c.

Plea to debt for rent against an administratrix, of *surrender* of tenancy by operation of law.

And for a further plea in this behalf, as to the non-payment of the said sum of £——, parcel of the said sum of money in the declaration first mentioned, the defendant says, that the said sum of £—— is claimed by the plaintiff to be due to him from the defendant as administratrix as aforesaid for one year's rent of a house and premises situate near a certain place called D. D., up to the —— day of ——, A. D. ——, alleged by the plaintiff to have been held by the said J. M. And the defendant further says, that long before any part of the said supposed rent accrued due, to wit, on the —— day of ——, A. D. ——, it was agreed between and by the plaintiff and the said J. M. in his lifetime, that the said J. M. should become yearly tenant to the plaintiff of the said house and premises, to wit, from Michaelmas then next, at a certain yearly rent, to wit, the yearly rent of £——, payable at certain times, to wit, half-yearly, during such tenancy. And the defendant further saith, that afterwards, to wit, at Michaelmas then next, being the commencement of the said year in respect of which the said rent is claimed by the plaintiff as aforesaid, the said J. M. entered into and upon and became possessed of the said house and premises as such yearly tenant as aforesaid. And that afterwards and before any part of the said rent of £—— accrued due, to wit, on the 1st day of October, A. D. ——, the estate, term and interest of the said J. M. of and in the said house and premises were duly surrendered to the plaintiff by act and operation of law (that is to say), by the said J. M. then quitting possession of the said house and premises by the license of the plaintiff, and relinquishing the possession and enjoyment thereof to the plaintiff, with the intention of putting an end to the said tenancy, and by the plaintiff then accepting such possession and enjoyment, with the intention of putting an end to the same tenancy. And this the defendant is ready to verify, &c.

Plea, stating grant of letters of administration to defendant, and that he derived no profit, and that he became assignee only as adminis-

And for a further plea in this behalf, as to the said first count, the defendant saith, that he ought not to be charged with the said rent so due and owing as in the said first count mentioned, or any part thereof, otherwise than as administrator of all and singular the goods and chattels of the said R. S. at the time of his death, who died intestate; because he says, that after the making of this indenture in the declaration mentioned, and during

the term thereby granted, to wit, on the —— day of ——, A. D. ——, the said R. S. died intestate and possessed of the said demised premises, and after whose death, to wit, on the —— day of ——, A. D. ——, administration of all and singular the goods, chattels, credits and effects which were of the said R. S. at the time of his decease, by William, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan, was in due form of law granted to the defendant, who afterwards, and after the decease of the said R. S., to wit, on the day and year last aforesaid, as such administrator, entered into and upon the said demised premises, and became and was possessed thereof for the residue of the said term by the said indenture granted and then yet to come and unexpired of and in the said demised premises, with the appurtenances. And the defendant further saith, that he has not at any time since the death of the said R. S. had, received or derived any profit, interest or advantage as such administrator or otherwise, by or from the said demised premises with the appurtenances, or any part thereof; and that the said demised premises, or any part thereof, have not, since the death of the said R. S. yielded any profit whatever. And the defendant further saith, that the estate and title, right and term of years of the said R. S. of and in the said demised messuages or tenements and premises, with the appurtenances, or any part thereof, did not at any time come to or vest in the defendant by assignment otherwise than under and by virtue of such administration as aforesaid; and that the said entry of the defendant in the declaration mentioned was made by him as such administrator as aforesaid. And the defendant further says, that he has not, nor at the time of the commencement of this suit, or at any other time since, had any goods and chattels which were of the said R. S. deceased at the time of his death in the hands of the defendant as administrator as aforesaid to be administered. And this the defendant is ready to verify, &c.

trator, and that he only entered as administrator, and plene administravit.

And for a further plea to the said second count of the said declaration, except as to the sum of £2 : 5*s.* parcel of the said sum of £7 : 5*s.* therein mentioned, the defendant says, that he ought not to be charged with the said sum of £7 : 5*s.* so due and owing as in the said second count mentioned, otherwise than as administrator of all and singular the goods and chattels which were of the said R. S. at the time of his death, who died intestate. Because he says, that heretofore and in the lifetime of the said R. S., to wit, on the —— day of ——, A. D. ——, the plaintiff demised to the said R. S. the said messuages and premises with the appurtenances in the said second count mentioned, to have and hold the same for one year then next following, and so from year to year for so long as the plaintiff and the said R. S. should respectively please, and the said R. S. then entered upon and became and was possessed of and tenant to the plaintiff of the said messuage and premises under and by virtue of the said demise, and being so possessed thereof, afterwards and during the continuance of the said demise and tenancy, to wit, on the 2d day of October, A. D. 18—, the said R. S. died intestate; and after whose death and during the continuance of the said demise, to wit, on the 26th day of October, A. D. 18—, administration of all and singular the goods,

Another plea nearly similar. (r)

(r) See similar plea stating an underlease by the testator; *Hornidge* v. *Wilson*, 3 P. & D. 641; 11 A. & E. 645, S. C.

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chattels, credits and effects which were of the said R. S. at the time of his decease, by William, by Divine Providence Archbishop of Canterbury, Metropolitan and Primate of all England, was in due form of law granted to the defendant, who afterwards and after the decease of the said R. S., to wit, on the day and year last aforesaid, as such administrator, entered into and upon the said messuage and premises and became and was possessed thereof, and used and occupied the same as such administrator as aforesaid, and not otherwise. And the defendant further saith, that he has not at any time since the death of the said R. S. had, received or derived any profit, interest or advantage as such administrator or otherwise by or from the said messuage and premises, with the appurtenances, or any part thereof, except rents and profits to the amount of £——. And that the said messuage and premises with the appurtenances have not since the death of the said R. S. yielded any profit whatever except the said sum of £——. And the defendant further says, that he has not, nor at the time of the commencement of this suit or at any time since, had any goods and chattels of the said ——, which were of the said R. S. deceased at the time of his death, in the hands of the defendant as administrator as aforesaid to be administered, except the said rents and profits to the amount of the said sum of £——. And this he is ready to verify; wherefore he prays judgment if he ought to be charged with the said sum of £—— in the said last count mentioned, *otherwise than as administrator as aforesaid*, except as to the said sum of £——, parcel thereof &c.

Surrender of a tenancy by operation of law before rent became due. (s)

And for a further plea in this behalf, as to the said sum of £——, in which the defendant is alleged to have been indebted to the plaintiff for the use and occupation of the said messuage with the appurtenances, the defendant says, that before any part of the said sum became due and whilst the defendant had held, used, occupied, possessed and enjoyed the said messuage with the appurtenances, as tenant thereof to the plaintiff, under the said sufferance and permission of the plaintiff in the said declaration mentioned, to wit, on the —— day &c, all the estate, term and interest, and the said tenancy of the defendant in the said messuage with the appurtenances, were duly surrendered to the plaintiff by act and operation of law; that is to say, by the defendant then quitting possession of the said messuage with the appurtenances by the license of the plaintiff, and relinquishing the possession and enjoyment thereof to the plaintiff with the intention of putting an end to the said tenancy, and by the plaintiff then accepting such possession and enjoyment of the said messuage with the appurtenances, with an intention of putting an end to the said tenancy. And the defendant further says, that he has not from thence hitherto had any further use or occupation of the said messuage with the appurtenances or any part thereof. And this the defendant is ready to verify, &c.

Plea that the demise was under an indenture of lease by which the defendant had power to determine the lease at the end of fourteen years by notice, and averment of notice and determination.

See *Cadby* v. *Martinez*, 11 A. & E. 720; 3 P. & D. 386, S. C.

(s) See plea of surrender and discharge, to action for use and occupation, *Turner* v. *Hardy*, 9 M. & W. 770.

III. ON RECORDS.

1. On Recognizances.

On Recognizances.

Nul tiel record. (t)

D. ats. B. } And the defendant, by ——, his attorney, says, that there is not any record of the said supposed recognizance [*or if in debt upon a judgment say*, " of the said supposed recovery,"] in the said declaration mentioned, remaining in the said Court in manner and form as the plaintiff hath above in his said declaration alleged. Wherefore the defendant prays judgment (u) if the plaintiff ought to have or maintain his aforesaid action thereof against him the said defendant.

No *capias ad satisfaciendum*. (x)

And for a further plea in this behalf, the defendant says, that after the recovery of the said judgment as in the said declaration mentioned, and before the commencement of this suit, there was no writ of *capias ad satisfaciendum* duly (y) sued or prosecuted out of the said Court of our said lady the queen, before the queen herself, [*or if in C. P.* "of the bench aforesaid,"] against the said E. F. upon the said judgment, and duly returned in the said Court (z) as according to law and the custom and practice of the said Court there ought to have been. And this the defendant is ready to verify, &c.

Death of principal before return of *ca. sa.* (a)

And for a further plea in this behalf, the defendant says, that after the recovery of the said judgment in the said declaration mentioned, and before the return of any writ of *capias ad satisfaciendum* thereupon against the said

(t) See the forms indexed, 7 Wentw. 631; Morg. 568; 1 Rich. C. P. 203, 441; 2 Rich. C. P. 218; Peterad. 318. *Nil debet* is a bad plea; see 1 Saund. 38 a; 2 Saund. 344; 1 East, 369. The plea of *nul tiel record* merely puts in issue the existence of the record as stated. When the declaration alleged the judgment to have been recovered against E. R., and the defendant pleaded *nul tiel record*, and on production of the judgment it appeared to have been recovered against E. R. *and others*, it was held that no objection could be taken on the ground of variance, and that the objection, if any, should have been taken by plea in abatement; *Cocks* v. *Brewer*, 11 M. & W. 51. Where upon a plea of *nul tiel record*, the record is to be produced by the defendant, the plaintiff must rule him to do so, before he can sign judgment, but where the plaintiff is to produce the record, it is sufficient to serve a notice on the defendant; *Swinburn* v. *Taylor*, 1 Dowl. N. S. 349.

(u) See *Attwood* v. *Taylor*, 1 M. & G. 288, note (a). An erroneous conclusion with an ordinary verification in a replication does not render it a nullity, so as to entitle the defendant to sign judgment of non pros; *Thompson* v. *Nicholas*, 10 M. & W. 330; 2 Dowl. N. S. 226, S. C.

(x) This may be pleaded. But a mere irregularity in the practice cannot; see the next note, also 2 Ld. Raym. 1096; see the forms indexed, 7 Wentw. 631; and see the pleadings in *Darling* v. *Gurney*, 2 Dowl. 101.

(y) See 16 East, 39; 1 D. & R. 50. The mere practice of the Court is not pleadable, therefore where bail sued on a recognizance pleaded that no *ca. sa.* was duly issued, returned and filed, according to the practice, which required that the writ should lie four clear days in the sheriff's office before its return, the plea was held bad on demurrer; 1 D. & R. 50; and see 7 B. & C. 800, S. P.

(z) The filing is not material. What follows after this allegation, except the conclusion, being an averment of matter of law, is not necessary, neither is it correct; see 1 D. & R. 50; 7 B. & C. 800; *supra*. It is, however, usually inserted, if the plea be merely a sham one; 3 Burr. 1360, otherwise it should be omitted.

(a) See the forms, Morg. 545; 7 Wentw. 631; 2 East, 312; 4 T. R. 587; 1 Wils. 334. If the principal died after the return of the *ca. sa.* and before the return is filed, the bail are fixed; 6 T. R. 284. The bail cannot plead that the principal died *before the issuing*, 10 Mod. 268, 303; or after the return, 8 Mod. 31; 1 Str. 511, S. C.; 6 T. R. 284, of the *ca. sa.*; for though a plea that the principal died before the writ issued be conclusive, if found for the defendant, yet it is not so if found for the plaintiff, inasmuch as the principal might still have died after the issuing and before the return of the writ.

ON RECOGNIZANCES.

E. F. [*the principal*], at the suit of the plaintiff upon the said judgment, to wit, on &c. he the said E. F. died. And this the defendant is ready to verify, &c.

On a recognizance of bail in error, that *puis darrein continuance* the debt was levied by *fi. fa.* on the principal.

And the defendant, by E. F., his attorney, says, that the plaintiff ought not further to maintain his action, because he says, that at the time of executing the writ of our lady the queen of *testatum fi. fa.* hereinafter mentioned, there was due and owing from the said J. J. to the plaintiff, for and on account of the said debt, damages, costs and charges in the said declaration mentioned, the sum of £—— of lawful &c. and no more; and the defendant further says, that after the affirmance of the said judgment and the said adjudication of the said Court of Exchequer, and before the commencement of this suit, to wit, on &c., the plaintiff, for the obtaining of the said money then due to him in respect of the said debt, damages, costs and charges aforesaid, issued out of the said Court of our said lady the queen, before the queen herself, the said Court then and still being holden at Westminster, upon the said judgment and adjudication a certain writ of our said lady the queen called a *testatum fi. fa.*, directed to the sheriff of ——, by which the said writ of our said lady the queen commanded the said sheriff [*here set out writ,*] which said writ afterwards, and before the delivery thereof to the said sheriff, was duly indorsed with a direction (*b*) from the plaintiff to the said sheriff to levy the sum of £——, besides sheriff's poundage and officer's fees, and which said writ so indorsed as aforesaid, afterwards and before the return thereof, to wit, on &c. was delivered to the said G. H., who then and from thenceforth until and after the return of the said writ was sheriff of the county of E., to be executed in due form of law. By virtue of which said writ, the said sheriff afterwards, and before the return thereof, and after the last continuance of the plea aforesaid, that is to say, after the —— day of —— in Hilary Term last past, from which time the plea aforesaid was continued till this day, to wit, from the —— day of —— in this same Term, and before this day, and before the commencement of this suit, that is to say, on &c. within his bailiwick, to wit, at &c. aforesaid, did cause to be levied of the goods and chattels of the said J. F. the said sum of £——, being all the money then due and owing to the plaintiff upon and by virtue of the said payment and adjudication, and all the sheriff's poundage and officer's fees, as he was directed by the said indorsement so made on the said writ as aforesaid. And this the defendant is ready to verify: wherefore he prays judgment if the plaintiff ought further to have or maintain his aforesaid action thereof against him, &c.

Plea to debt on a recognizance (at suit of executors) that the record of the recognizance was in the Court of Queen's Bench, and that therefore admi-

And for a further plea in this behalf, the defendant says, that the record in the said recognizance in the said declaration mentioned at the time of the death of the said W., and also at the time of the granting of the administration to the said J. was remaining in the said Court of our said lady the queen before the queen herself at Westminster, within the royal peculiar jurisdiction of the Dean and Chapter of the Collegiate Church of St. Peter's, in Westminster aforesaid, and so the granting of the administration with the

(*b*) Examine this with writ.

will of the said W. annexed as to the said recognizance did of right belong to the said Dean and Chapter of the said Collegiate Church of St. Peter's, in Westminster, and not to the said Archbishop of Canterbury. And this &c. nistration *cum testamento annexo* ought to have been granted by the Dean and Chapter. On Recognizances.

It seems that a payment by 4 Ann. c. 16, s. 12, or a release to the principal or bail may be pleaded by the latter; but they cannot avail themselves of the bankruptcy and certificate of the principal by pleading it in their discharge, as their claim to relief on that ground is founded rather upon the *equitable* jurisdiction of the Court than upon any strict legal defence. Petersdorff on Bail, 367; 1 B. & P. 448; 2 B. & P. 45; 5 Moore, 168; 1 B. & A. 393; 16 East, 39. Other pleas.

It seems that bail may plead that a writ of error was sued out and allowed after the issuing and before the return of the *ca. sa.*; 2 East, 439.

3. On Judgments. On Judgments.

First plea, nul tiel record, as ante, 212; *second plea.*] That after the recovery of the said judgment, and before the commencement of this suit, to wit, on &c. he the defendant paid and satisfied to the plaintiff the said sum of £——, in form aforesaid recovered. And this the defendant is ready to verify, &c. Payment. (c)

And for a further plea in this behalf, the defendant says, that though the said judgment in the [—— count of the] declaration mentioned, was in fact obtained by the plaintiff against the defendant, he the defendant was not at any time served with any process issuing out of the said Court of [Common Pleas] in Ireland, at the suit of the plaintiff, for the cause of action upon which the said judgment was obtained as aforesaid, nor had he at any time notice of any such process, nor did he the defendant at any time appear in the said Court to answer the plaintiff in the said action on which the judgment was so obtained, as in the [—— count of the] declaration mentioned. And this the defendant is ready to verify, &c. Plea to action on Irish judgment, that the defendant was never served with nor had notice of any process in the action. (d)

See the pleas in debt on judgments in general, Com. Dig. Pleader, 2 W. 13. The plea of *nul tiel* record is in form as *ante*, 212. The defendant cannot plead accord and satisfaction, because the stat. of 4 Ann. c. 16, s. 12, only authorises a plea of payment; 3 East, 251; see *ante*, vol. i. Index, tit. "*Judgment.*" To debt on judgment against an executor, suggesting a devastavit, he may plead not guilty; 1 Saund. 219, n. 7; see *ante*, vol. i. Index, "*Judgment.*" Plea that the defendant was taken on a *ca. sa.*, *Collins* v. *Beaumount*, 10 A. & E. 226; 2 P. & D. 363, S. C. Other pleas.

(c) This plea is given by the 4th Ann. c. 16, s. 12.

(d) A judgment of one of the superior Courts of Ireland, or of any other than one of the superior Courts of this country, is not conclusive against the defendant if it appear that he was not duly served with process in the action, and the above is therefore a good plea; *Ferguson* v. *Mahon*, 11 A. & E. 179; 3 P. & D. 143, S. C.

On Bye Laws.

IV. ON BYE LAWS.

To an action on a bye law by the master and warden of an incorporated company, plea that the plaintiffs were not masters, &c. (e)

And for a further plea in this behalf, the defendant says, that at the time of the commencement of this suit, the said plaintiff W. G. was not nor is he the master of the said mystery or art of [the Furriers in London]; and the said plaintiff R. C. was not nor is he the warden of the said mystery; nor were nor are the said plaintiffs entitled to maintain their said action against the defendant in this behalf. And this the defendant is ready to verify, &c.

For Calls under Railway Acts, &c.

For Calls under Railway Acts, &c.

Plea that the defendant was not a proprietor of shares. (f)

And for a further plea in this behalf, the defendant says, that he was not nor is a proprietor of the said shares or of any of them in manner and form as in and by the said declaration in that behalf above alleged. And of this the defendant puts himself upon the country, &c.

Plea that the defendant, sued as an original subscriber, had transferred his shares. (g)

See plea in *Great North of England Railway Company* v. *Biddulph*, 7 M. & W. 251.

Plea that the shares were declared to be forfeited by the directors, and that the defendant acquiesced in such forfeiture. (h)

See *South Eastern Railway Company* v. *Hebblewhite and others*, 12 A. & E. 497; 4 P. & D. 246, S. C.; *Sheffield and Manchester Railway Company* v. *Woodcock*, 7 M. & W. 574.

(e) See *Graves* v. *Colby*, 9 A. & E. 356; 1 P. & D. 235, S. C.

(f) To an action of debt for calls on shares in an incorporated railway company, the Court refused to allow the defendant to plead that due notice of the calls had not been given, and that no time or place had been appointed for the payment of the amount due upon the calls in accordance with the terms of the act; and also a plea that the calls were made for other purposes than those mentioned in the act; *Brighton Railway Company* v. *Wilson*, 6 Bing. N. C. 135; 8 Dowl. 40, S. C. In another case the Court struck out a plea allowed by a judge at chambers, that there were fewer shares in the company than were directed by the act, and refused to allow a plea that deviations had been made in the construction of the line of railway, not warranted by the act, and that the calls were made for the purpose of paying the expenses of those deviations; *Brighton Railway Company* v. *Fairclough*, *id. ibid.* See also *Southampton Railway Company* v. *Hibblewhite*, 4 P. & D. 246. Where a railway act enacted that in actions for calls it should be sufficient for the company to declare that the defendant, being a proprietor, was indebted in the amount of calls, without setting forth the special matter, and that at the trial it should only be necessary to prove that the defendant was a proprietor, that the calls were made, and that due notice thereof was given; it was held to such declaration *nil debet* could not be pleaded, but that the facts required to be proved by the plaintiffs in support of the case must be considered as embodied in the declaration, and if their absence be relied upon by the defendant, they should be traversed by pleas concluding to the country in the same way as if those facts had been expressly averred in the declaration; *Edinburgh Railway Company* v. *Hibblewhite*, 6 M. & W. 707; 8 Dowl. 802, S. C.; see also *London and Brighton Railway Company* v. *Fairclough*, 6 Bing. N. C. 270.

(g) A plea, that true it is that the defendant on &c. was the proprietor of the shares in the declaration mentioned, but that after the making of the call, and before the same was payable, to wit, on &c. he transferred his shares to J. S., which transfer was duly entered and indorsed before the call was payable, whereby the defendant ceased to be proprietor of the shares, and to be liable to the call, was held bad, as amounting to an argumentative plea of nunquam indebitatus, in an action against a proprietor, not being an original subscriber; *Aylesbury Railway Company* v. *Mount*, in error, 4 M. & G. 668; see also *Smith* v. *Goldsworthy*, 3 G. & D. 448. The sufficiency of a plea must of course depend on the particular language of the act of parliament.

(h) Where it was enacted that the directors might either sue for calls, or, in their option, the proprietors neglecting to pay should forfeit their shares, and provided that no advantage should be taken of a forfeiture unless the shares should be declared to be forfeited at some meeting of the company, general or special, to be held within six months after the forfeiture; it was held, in an action for calls, that a plea that the shares were forfeited should aver that they were so declared according to the terms of the proviso; *Edinburgh Railway Company* v. *Hebblewhite*, 6 M. & W. 707; 8 Dowl. 802, S. C.

V. ON STATUTES.

1. By Party aggrieved.

See *Pelly* v. *Rose*, 13 L. J. R. N. S., Exchequer, 155. To debt for duties payable by owners of vessels under the Ramsgate Harbour Act, 32 Geo. 3, c. lxxiv., plea, under the 58th section of the act, that the defendant was an inhabitant of Sandwich, and that the vessel was bound to or from that port.

2. On Penal Statutes.

On Penal Statutes.

Observations.]—The rules Hil. T. 4 W. 4, are silent as to pleas to debt on *Penal Statutes* or other Statutes, and do not apply to them; and therefore *nil debet*, as well as *not guilty*, is a proper plea to such actions, and puts all the facts in issue as before the rules; see *ante*, vol. i. p. 513. The statute 21 Jac. 1, c. 4, s. 4, expressly authorises the plea of general issue, or that the defendant *owes nothing*; and *not guilty* was considered proper where the declaration charged an offence, *Coppin* v. *Carter*, 1 Term Rep. 462; and that act extends to *subsequent* penal acts, *Jones* v. *Williams*, 4 M. & W. 375; 7 Dowl. 206, S. C. Where a statute creating a penalty contains an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception; but where the exception comes by way of proviso, either in a subsequent section or statute, it is matter of defence and must be pleaded, *Thibault, qui tam*, v. *Gibson*, 12 M. & W. 88; 1 D. & L. 253, S. C.; and if the exception comes by way of proviso, even if it be in the enacting clause, it is doubtful whether it is not matter of defence; per Parke, B., *id. ibid.* In debt *qui tam*, a plea that "defendant doth not owe to the plaintiff" was held insufficient, though if it had been "doth not owe, generally," it might have been otherwise, Hobart, 327; Reg. Plac. 302; Bac. Ab. tit. Action, *qui tam*, D.; *id.* tit. Pleas, I.; Com. Dig. Pleader, 2 S. 11, 17; see further, *Hick's case*, 1 Salk. 372; *Shipman* v. *Henbest*, 4 Term Rep. 109.

And the defendant, by ——, his attorney, says, that he is not indebted in manner and form as the plaintiff has above thereof alleged. And of this the defendant puts himself upon the country, &c. Nil debet. (*i*)

And the defendant, by ——, his attorney, says, that he is not guilty of the said alleged grievances above laid to his charge, or of any or either of them, or any part thereof, in manner and form as the plaintiff has above thereof complained against him. And of this the defendant puts himself upon the country, &c. Not guilty. (*k*)

And for a further plea in this behalf, the defendant says, that before the reaping or cutting down of the said corn and grain, and whilst the plaintiff was such farmer and proprietor as aforesaid, to wit, on the —— day of ——, A. D. ——, by a certain agreement and composition then made and Plea to debt for not setting out tithes, a composition between plaintiff and defendant. (*l*)

(*i*) The defendant may plead the general issue, or traverse some material allegation in the declaration.

(*k*) See *Faulkner* v. *Chevell*, 5 A. & E. 213; 6 Nev. & M. 704; and see S. C. 10 A. & E. 76; 2 P. & D. 262.

(*l*) This is a penal action within the stat. 21 Jac. 1, c. 4, s. 4, and therefore nil debet is a good plea to it; *Earl Spencer* v. *Swannell*, 3 M. & W. 154; 6 Dowl. 326, S. C.

On Statutes. entered into between the plaintiff and the defendant, the plaintiff agreed to suffer and permit the defendant to have, take and retain to his own use all and singular the tithes of the said corn and grain, arising, growing, renewing and happening on, upon and from the said land, whereof the defendant was occupier as aforesaid, for the space of one year then next following, and so on from year to year for so long as the plaintiff and the defendant should respectively please, the defendant yielding and paying to the plaintiff the yearly sum of £—— for so long a time as the defendant should so take, have and retain the said tithes to his own use under and by virtue of the said agreement and composition. And the defendant further saith, that the said agreement and composition, from the time of the making of the same, hitherto hath been and still is in full force, wherefore the defendant did on the said days and times in the said declaration mentioned, under and by virtue and in pursuance of the said agreement and composition, take and carry away the said corn and grain as he lawfully might for the cause aforesaid. And this the defendant is ready to verify, &c.

To debt *qui tam*, under 18 Geo. 2, c. 20, for practising as justice of the peace, without being duly qualified, plea of qualification. (*m*)

And the defendant, by ——, his attorney says, that at the time of his the defendant's so acting as a justice of the peace in the declaration mentioned, he had in law, to and for his own use and benefit, in possession, a freehold estate for life in lands, tenements or hereditaments, lying or being in that part of Great Britain called England, of the clear yearly value of £100, over and above what would satisfy and discharge the incumbrances that affected the same, and over and above all rents and charges payable out of or in respect of the same. And this the defendant is ready to verify, &c.

To an action for bribery, that a prior suit is depending for the same offences. (*n*)

And for a further plea in this behalf, the defendant says, that one E. F., before the commencement of this suit, to wit, on &c., in the —— year of the reign of our lady the now queen, sued and prosecuted out of the Court of our said lady the queen before the queen herself, against the defendant a certain writ (*o*) of our said lady the queen called a writ of summons, with intent to declare thereon as hereinafter mentioned, by which said writ the defendant was commanded that within eight days after the service of the said writ upon him he should cause an appearance to be entered for him in the said Court of Queen's Bench at Westminster, in an action of debt at the suit of the said E. F., and that in default of his so doing, the said E. F. would cause an appearance to be entered for him and proceed therein to judgment and execution; and the defendant further saith, that afterwards, to wit, on &c. at Westminster, in the county of Middlesex, the defendant was duly served with a copy of the said writ, with a notice thereto subscribed, according to the course and practice of the said Court; (*p*) and that afterwards, that is to say, on &c. in the —— year of the reign aforesaid, in the Court of our said lady the queen before the queen herself, came the said E. F. by his attorney, and the defendant by his attorney aforesaid also came, according

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(*m*) See *Pack* v. *Tarpley*, 9 A. & E. 468; 1 P. & D. 478, S. C.

(*n*) See the forms, 7 Wentw. 632, 638. The pendency of a prior suit in a penal action may be pleaded in bar; Sayer's Rep. 216; Bac. Ab. Actions, *qui tam*, D. The defendant cannot plead double in a penal action.

(*o*) State the process according to the fact and form.

(*p*) This allegation is inserted in this particular case on account of the 9 Geo. 2, c. 38.

to the exigency of the said writ, and thereupon the said E. F. declared upon and by virtue of the said writ against the defendant in an action of debt for £——, for and in respect of divers supposed penalties of £—— each, in that declaration alleged to have been incurred by the defendant for certain offences supposed to have been committed by the defendant, contrary to the form of the statute in such case made and provided; and after stating in the said declaration, amongst other things, that before and at the time of the committing of the several supposed offences thereinafter mentioned, an election of two burgesses to serve as burgesses for the borough of ——, in the county of ——, in the parliament of the United Kingdom of Great Britain and Ireland, was expected shortly to be had and made, and that before and until and at such election the defendant was a candidate, that he might be elected one of the said burgesses to serve in parliament for the said borough, the said E. F. in the —— count of his said declaration complained against the defendant; for that the defendant before the said election, to wit, on &c. did unlawfully corrupt one G. H. who then claimed a right to vote in elections for members to serve in parliament for the said borough, by then unlawfully and corruptly giving to the said G. H. a certain sum of money, to wit, the sum of £——, as a gift and reward for him the suid G. H. to give his vote in that election for the defendant, contrary to the form of the statute in such case made and provided; and in the —— count of the said bill the said E. F. also complained against the defendant for that &c. [*Here state all the counts in the action at the suit of E. F. which were for the same penalties as those mentioned in the present suit, and then proceed as follows:* (q)] And the said E. F. in each and every count of his said declaration, after stating the supposed offence in such counts specified, alleged that an action had thereby, and by force of the statute in such case made and provided, accrued to him the said E. F. to demand and have of and from the defendant the said sum of £——. And which said action so commenced by and at the suit of the said E. F. against the defendant as aforesaid for the several penalties in his said bill mentioned, is now depending in the said Court of our said lady the queen before the queen herself, and wholly undetermined. And the defendant further says, that the defendant named in the said writ and declaration of the said E. F. and he the defendant, the now defendant named in the said declaration of the plaintiff, are one and the same person and not other or different persons, and that the said supposed offences mentioned in the said declaration of the said E. F., though stated with small and immaterial variances with respect to the names of the persons supposed to have been bribed and otherwise, are the same identical offences as are mentioned and alleged to have been committed in the said declaration of the plaintiff, and are not other or different offences. And this the defendant is ready to verify, &c.

Another action for the same offence compounded by rule of Court. (r)

And for a further plea in this behalf, the defendant says, that after the committing of the said several offences in the said declaration mentioned, and before the commencement of this suit against the defendant, to wit, on

(q) It has been usual to set forth the declaration in the former suit as in this precedent; but this does not seem necessary or advisable, and the averment that the two suits were for the same offences will suffice.

(r) See another form, 7 Went. 188; Paley on Convictions, Appendix, 2d edit.

On Statutes.

the —— day of ——, (*s*) in —— term, in the —— year of the reign of our lady the now queen, one E. F. sued and prosecuted out of the Court of our said lady the queen, before the queen herself, the said Court then and still being holden at Westminster, in the county of Middlesex, a certain writ of our lady the queen called a writ of summons, for the purpose of recovering the same several sums of money (*t*) in the said declaration mentioned, and thereby alleged to be by the defendant forfeited; and such proceedings were thereupon had, that afterwards, to wit, on —— next after ——, in the —— year of the reign aforesaid, by a certain rule of the said Court it was

Leave to compound.

ordered that the said E. F. should have leave to compound that action with the defendant for the sum of £——, and the costs of the said suit to be taxed by the master, as by the said rule now remaining in the said Court more fully appears. And the defendant further saith, that the said offences for which the said action so compounded as aforesaid by the said rule of Court was brought, and the said offences in the said declaration in this suit mentioned, are the same identical offences, and not other or different

Payment accordingly.

offences. And the defendant further saith, that in pursuance of the said rule the defendant afterwards, to wit, on &c. aforesaid, did pay to the said E. F. the said last-mentioned sum of £——, together with the said sum of £——, being the sum taxed by the master for the costs of suit aforesaid, which said sums of £—— and £—— the said E. F. then accepted in full satisfaction and discharge of the said suit. And this the defendant is ready to verify, &c.

Former conviction for the same offence. (*u*)

And the defendant, as to the first count of the declaration, says, that after the committing the said offence in that count mentioned, and before the commencement of this suit, to wit, on &c. one E. F. went before G. H. Esq. then and still being one of her majesty's justices of the peace for the said county of —— residing near the place where the offence was committed, and informed the said G. H. that the defendant on &c. then last past, did &c. [*here state the offence as in the information*], and thereupon such proceedings were had before the said G. H. the justice aforesaid, that afterwards, to wit, on &c. the defendant was duly convicted of the said offence according to the form of the statute in such case made and provided, as by the same record in the Court of our said lady the now queen of general quarter sessions of the peace, holden in and for the said county of —— more fully appears; which said judgment of conviction is yet in full force and effect, not reversed, quashed or vacated. And the defendant avers, that he, the defendant, who is sued by the name of defendant in the said writ and declaration of the plaintiff, and the defendant in the said information and conviction named, are one and the same person, and not other or different. And that the said offence in the said —— count of the said declaration mentioned, and the said offence in the said information charged, and whereof the defendant was so convicted as aforesaid, was done and committed by the defendant at one and the same time, and are in fact the very same identical offence, and not other or different offences. And this he is ready to verify, &c.

(*s*) The teste of the writ.

(*t*) Or "recovering penalties for the same offences."

(*u*) Must be pleaded; 2 Stra. 701; see 9 East, 437; see forms, Paley on Convictions, Appendix, 2d edit.

Judgment recovered by another person for the same identical offences and penalties as in plaintiff's suit.

And for a further plea in this behalf, the defendants say, that one J. S., after the committing of the said supposed offences, and after the conviction thereof, as in the said declaration mentioned, and before the commencement of this suit, to wit, on &c. in the —— year of the reign &c. sued and prosecuted out of the said Court of our said lady the queen, before the queen herself, against the defendants, a certain writ of our said lady the queen, called a writ of summons, directed to the defendant, with intent to declare thereon as hereinafter mentioned, by which said writ our said lady the queen commanded &c. [*proceed as ante*, 217, *until statement of defendant's appearance*], and the defendants further say, that the said writ was so sued out of the said Court by the said J. S. against the defendants with intent to implead them the defendants, amongst other things, for the said offences in the said declaration in this suit mentioned, according to the course and custom of the said Court, and that in pursuance of such intention the said J. S. afterwards, to wit, on the —— day of ——, A. D. ——, declared against the defendant for the very same identical supposed offences as those named and set forth in the declaration in this suit, and such proceedings were thereupon had in the said Court of our said lady the queen, that afterwards, to wit, in —— term aforesaid, it was considered and adjudged by the said Court that the said J. S. should recover against the defendants the sum of money in the said declaration above-mentioned, to wit, the sum of £2000, the same including, amongst other things, the penalties for the said supposed offences in the said declaration in this suit mentioned, as by the record and proceedings thereof still remaining in the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid, more fully appears; which said judgment still remains in full force and effect, not in the least reversed, satisfied or made void; and the defendants further say, that the said T. H. and H. C. named in the said writ of the said J. S. and the said J. H. and H. C. the defendants named in the said writ of the plaintiff are the same persons, and that the said offences in the said declaration of the said J. S. are the same identical offences as are mentioned and alleged to have been committed in the said declaration of the plaintiff, and not other or different. And this the defendants are ready to verify, &c.

IX. PLEAS IN BAR IN COVENANT.

I. IN GENERAL.

In General.

Non est factum. (*a*)

In the Queen's Bench [*or* " C. P." *or* " Exchequer."]

On the —— day of ——, A. D. 1844.

D. ats. B. } The defendant, by E. F. his attorney, [*or* " in person,"] says, that the said indenture [*or* " articles of agreement," *or* " deed poll," *as in the declaration*] is not his deed. And of this the defendant puts himself upon the country, &c.

Non est factum after craving oyer.

The form of plea, as *ante*, 174, and notes thereto, will here apply.

Plea of payment. (*b*)

And the defendant, by ——, his attorney, saith, that the defendant on the said &c. aforesaid did pay to the said A. B. the said sum of £—— in the said indenture mentioned. And of this the defendant puts himself upon the country, &c.

Plea of performance. (*c*)

And the defendant, by E. F., his attorney, saith, that he did &c. [*Here state the performance in the words of the covenant, if such covenant were in the affirmative, and conclude as follows:*] according to the form and effect of the said indenture and covenant. And of this the defendant puts himself upon the country, &c.

License. (*d*)

And for a further plea in this behalf, to the said alleged breach of covenant first above assigned, the defendant saith, that he did plough and break

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(*a*) There is no general issue in covenant; 1 Stark. 311. *Non infregit conventionem* is a bad plea; 2 Taunt. 278; 8 T. R. 280. See *ante*, vol. i. Index, "*Covenant*;" see also *Fox v. Waters*, 4 P. & D. 1. This plea should be adopted where the defendant denies his execution of the deed, but if he be desirous of taking advantage of a variance in setting it out he should crave oyer and demur; see *Smith v. Jennings*, 9 Dowl. 162; *ante*, vol. i. p. 450, note (*l*). A plea to covenant by lessors on an indenture of demise, that the indenture was not signed by the plaintiffs or their agent lawfully authorised by writing, is bad, as the want of execution by the plaintiff is no answer to the action; *Cooch v. Goodman*, 2 Q. B. Rep. 588; 2 G. & D. 159, S. C.; *Aveline v. Whisson*, 4 M. & G. 801.

(*b*) See form, Plead. A. 316, 449; *solvit post diem* in *covenant* is bad, but the payment must be pleaded as in accord and satisfaction. Although the declaration allege non-payment of money as a breach, yet a plea of payment, unless *on the appointed day*, must conclude with a verification; see *Ensall v. Smith*, 1 Crom. M. & Ros. 522; 3 Dowl. 193.

(*c*) As to the mode of pleading performance, whether of an affirmative or negative or disjunctive covenant, see *ante*, 196; vol. i. Index, "*Performance*;" Com. Dig. Pleader, vol. ii. 13; Co. Lit. 303 b; and see forms, Morg. 489; Petersdorff's Prec. 153.

(*d*) A license is frequently pleaded in covenant, but when by parol it is not sustainable, unless provided for by the terms of the deed. In general a verbal or unsealed written discharge is inoperative against a deed, and this plea is rarely sustainable. See the cases cited, 5 T. R. 280, 1; 2 Saund. 47, 48, n. 1; 1 Taunt. 428; 3 T. R. 590; Co. Lit. 222 b, note 2; see a form of plea of license, Petersdorff, 154.

up, &c. [*Here enumerate the acts complained of as in the declaration, or, if they be very numerous, the plea may be more concise, as follows:* "That he the defendant did commit the said alleged breaches of covenant first above assigned,"] by and with the leave and license of the plaintiff to him the defendant for that purpose first, to wit, on &c. given and granted. And this the defendant is ready to verify, &c.

Accord and satisfaction. (*f*)

And for a further plea in this behalf to the breach of covenant [first] above assigned, the defendant says, that he the defendant, before the commencement of this suit, to wit, on &c. paid to the plaintiff the sum of £——, in full satisfaction and discharge of the said sum of £—— in the said breach of covenant mentioned, and of all the damages by the plaintiff sustained by the non-payment thereof, and the plaintiff then accepted and received the same of and from the defendant in full satisfaction and discharge of the said sum of £—— in the said breach of covenant mentioned, and of the damages sustained by the plaintiff by the said breach of covenant. And this the defendant is ready to verify, &c.

Observations.]—A plea that *no rent is in arrear* is bad in covenant for rent or to pay on a particular day, because it admits that the rent was not *duly* paid, and that damages are recoverable. It is therefore necessary, according to the facts, to plead payment *on the day*, or to plead payment by way of accord and satisfaction. Therefore, when the defendant has neglected to pay the money at the appointed day, but has paid it afterwards, the above plea of *accord and satisfaction is proper*. See another form of plea of accord and satisfaction, 3 East, 252; and see other forms in assumpsit, *ante*.

Plea of *payment of money* into Court in covenant. (*g*)

And as to the alleged breaches of covenant by the plaintiff [fourthly and lastly] above assigned, the defendants say, that the plaintiff ought not further to maintain his action in that behalf, because the defendants now bring into Court the sum of £90 ready to be paid to the plaintiff. And the defendants further say, that the plaintiff hath not sustained damages to a greater amount than the said sum of £90 in respect of the said breaches of covenant fourthly and lastly above assigned. And this the defendants are ready to verify; wherefore they pray judgment if the plaintiff ought further to maintain his said action in that behalf. (*h*)

(*f*) See precedent, Plead. A. 334. Accord and satisfaction *before* breach of a covenant cannot be pleaded in bar of an action on the covenant; 1 Taunt. 428; Com. Dig. Pleader, 2 V. 8; *sed vide* Cro. Eliz. 46.

(*g*) Payment into Court generally to a declaration in covenant, setting out several covenants, and assigning a general breach, admits some damage upon every part of the breach, and therefore judgment cannot be arrested, although the breach, with reference to some particular covenant, be bad on demurrer; *Wright* v. *Goddard*, 3 N. & P. 361. Where a defendant is sued on a covenant to repair, and has underlet the premises to a third party, who has entered into similar covenants, and through whose default the right of action has accrued against the defendant, it seems the defendant should pay the amount of dilapidations into Court, as he is not entitled in an action against his lessee to recover the costs of defending the first action; *Walker* v. *Hatton*, 10 M. & W. 249.

(*h*) See the form in *Marshall* v. *Whiteside*, 3 Crom. M. & Ros. 188; 4 Dowl. 717.

ILLEGALITY. (i)

II. ILLEGALITY.

Bubble Act. Indenture void at common law, being made for furthering a scheme injurious to the public.

And for a further plea in this behalf, the defendant says, that before and at the time of the making of and entering into the indenture in the said declaration mentioned, and before the passing of a certain act of parliament made and passed in the 6th year of the reign of his late Majesty King George the Fourth, intituled, "An act to repeal so much of an act passed "in the 6th year of his late Majesty King George the First as relates to "the restraining several extravagant and unwarrantable practices in the "said act mentioned, and for conferring additional powers upon his majesty "with respect to the granting of charters of incorporation to trading and "other companies," to wit, on the 1st day of July, in the year of our Lord 18—, divers persons, and amongst others the plaintiffs, formed themselves and entered into a public undertaking, project and attempt tending to the common grievance, prejudice and inconvenience of the subjects of our lady the now queen in general, and great numbers of them in their trade and commerce, that is to say, by opening books for public subscriptions, and drawing in persons to subscribe therein towards raising great sums of money, amounting in the whole to a large sum of money, to wit, the sum of £500,000, and by presuming to act as a corporate body, and pretending to make their shares in stocks transferable and assignable, without any act of parliament, or by any charter from the crown for so doing, and by pretending that they and the persons who should subscribe to and take shares in the said undertaking, project and attempt, would form a company or partnership society for the purpose and object of purchasing and working mines of tin, copper, and lead ore, situate in or near the counties of Cornwall and Devon, and to smelt, manufacture, refine, or otherwise prepare for sale, and to sell and dispose of the ores, metals, minerals and other products to be obtained and raised from such mines respectively, when in truth and in fact there were no mines purchased or worked, or intended so to be: and the defendant in fact saith, that the said indenture in the said declaration mentioned was made, entered into, and executed for the furthering, countenancing and proceeding in the said undertaking, project and attempt, tending to the common grievance and nuisance of divers and very many of the liege subjects of our said lady the queen, whereby the said indenture was and is wholly void in law, and contrary to the statute in that case made and provided. And this the defendant is ready to verify, &c.

Another plea.

And for a further plea the defendant saith, that the said company or partnership in the said indenture mentioned was and is a public undertaking and

(i) Where a declaration in covenant stated that the defendant had granted an annuity to the plaintiff, and for the better securing the said annuity demised a rectory and prebendal stall to certain trustees, and covenanted for payment of the annuity, and alleged as a breach the non-payment thereof; and to this declaration the defendant, being under terms of pleading issuably, pleaded that the indenture was made with the view of charging, and was a charge upon the rectory, the same being a benefice with a cure of souls, contrary to the stat. 13 Eliz. c. 20, and that the indenture and security were made to evade the statute; it was held that the plea was not an issuable one, as it stated no new fact upon which the plaintiff could go to the jury, and that the statute avoided the charge upon the benefice only, but not the covenant in the deed containing it; *Sloane* v. *Packman*, 11 M. & W. 770.

attempt tending to the common grievance, prejudice and inconvenience of great numbers of the subjects of our lady the queen, to wit, the said persons and names in the said indenture, and all the parties thereto, in their trade, commerce and other lawful affairs, and that the said indenture was and is made and entered into for the furthering, countenancing and proceeding in the said undertaking and attempt, to the common grievance and nuisance of the said subjects of our said lady the queen, whereby the said indenture was and is wholly void in law. And this the defendant is ready to verify, &c. ILLEGALITY.

And for a further plea the defendant saith, that the said company or partnership in the said indenture mentioned was and is a company or partnership consisting, to wit, of the plaintiffs and other persons, presuming to act as if they were and are a corporate body, and pretending to raise a transferable and assignable stock, without any legal authority, and without any charter from the crown for so doing, that is to say, as a corporate body, for the purpose and object of purchasing and working mines of tin, copper and lead ore, situate in or near the counties of Cornwall and Devon, and of smelting, manufacturing, refining, or otherwise preparing for sale, and of selling and disposing of the ores, metals, minerals and other products to be obtained and raised from such mines respectively, and for other purposes unknown, and having a number of shares, not exceeding 10,000, transferable and assignable by and from the holders of such shares to any other person or persons at the pleasure of the holders thereof. And the defendant in fact saith, that the said indenture was and is made and entered into for the furthering, countenancing and proceeding in the said company or partnership, to the common grievance and nuisance of all the liege subjects of our lady the queen, whereby the said indenture was and is wholly void in law. And this the defendant is ready to verify, &c. Third plea.

And for a further plea in this behalf, the defendant saith, that the said indenture was and is made and entered into for the furthering, countenancing and proceeding in the said company or partnership therein mentioned, the said company or partnership being a new and unlawful undertaking, tending to the common grievance, prejudice and inconvenience of great numbers of the queen's subjects in their trade and commerce, that is to say, an undertaking for the purpose and object of purchasing and working mines of tin, copper and lead ore, situate in or near the counties of Cornwall and Devon, and of smelting, manufacturing, refining, or otherwise preparing for sale, and of selling and disposing of the ores, metals, minerals and other products to be obtained and raised from such mines respectively, and which said undertaking was a public undertaking, and did then and still doth relate to affairs in which the trade, commerce and welfare of great numbers of the queen's subjects were and are concerned, to the common grievance and nuisance of the liege subjects of our said lady the queen, whereby the said indenture was and is void in law. And this the defendant is ready to verify, &c. Fourth plea.

And for a further plea in this behalf, the defendant saith, that the said company or partnership in the said indenture mentioned was and is a company or partnership without any legal authority, or without any charter Fifth plea.

ILLEGALITY.

from the crown for so doing, pretending to raise a transferable stock, to a large amount, to wit, not exceeding £50,000, to be divided into not more than, to wit, 10,000 shares, which shares were to be and are transferable and assignable from the holders thereof to any person or persons at the pleasure of such holders. And the defendant further saith, that the said indenture was and is made and entered into for the furthering, countenancing and proceeding in the said company or partnership, to the common grievance and nuisance of the subjects of our lady the queen, whereby the said indenture was and is wholly void in law. And this the defendant is ready to verify, &c.

ON APPRENTICE DEEDS.

III. ON APPRENTICE DEEDS.

Plea, to a declaration on a sea apprentice indenture for not finding necessaries, and paying wages, that plaintiff deserted the defendant's service. (*k*)

And for a further plea in this behalf, the defendant saith, that the said T., after the making of the said indenture, and before the expiration of the second year of the said term of three years in the said indenture mentioned, to wit, on &c. wrongfully and without the license or consent of the defendant deserted from and left the service of the defendant, and did not at any time afterwards return thereto; and the defendant further saith, that he did continually, from and after the making of the said indenture until the said T. so deserted and left the service of the defendant as aforesaid, find unto the said T. sufficient meat, drink and lodging, and did during that time, to wit, on &c. in lieu of all other necessaries, pay unto the said T. £14 for the first year of the said term, and during the residue of the said term was ready and willing to have found and would have found him the said T. sufficient meat, drink and lodging, and paid him the other sums of money stipulated to be paid to him, according to the form and effect of the said indenture and the said covenant of the defendant in that behalf, if he the said T. had not so deserted from and left, or if he had returned to, the service of the defendant. And this the defendant is ready to verify, &c.

Plea, that plaintiff, with consent of defendant, entered on board another ship for a time, but deserted from the same.

And for a further plea in this behalf, the defendant saith, that the said T. after the making of the said indenture, and before the expiration of the second year of the said term of three years in the said indenture mentioned, to wit, on &c., the said T. then being in the service of the defendant on board of a certain ship or vessel of the defendant in parts beyond the seas, to wit, at Malta, and the said ship being then about to proceed to a certain other part beyond the seas, to wit, to Egypt, the defendant at the request of the said T. permitted and gave leave to the said T. to enter into the service of one C., who was then resident at Malta, and to continue therein until the said ship or vessel of the defendant should return to Malta aforesaid, and the said T., by such leave and permission, did then enter into the service of the said C., and that the ship or vessel did afterwards sail to Egypt aforesaid, and afterwards, to wit, on &c. return to Malta

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(*k*) As to this defence, see 6 B. & C. 680; 1 B. & C. 460.

aforesaid; and the defendant further says, that the said T., after he had so entered into the service of the said C., and before the expiration of the said second year of the said term of three years in the said indenture mentioned, to wit, on &c., wrongfully and without the license or consent of the said C. or of the defendant, deserted and run away from and left the service of the said C., and did not at any time afterwards return thereto or to the service of the defendant; and the defendant further says, that he did continually, until the said T. so entered into the service of the said C. as aforesaid, and the said C. did from that time until the said T. so deserted and run away as aforesaid, find the said T. sufficient meat, drink and lodging, and that the defendant did during that time, to wit, on &c. aforesaid, in lieu of all other necessaries, pay unto the said T. £14 for the said term; and that the said C. would have found unto the said T. sufficient meat, drink and lodging until the return of the said ship to Malta, and the defendant, during the residue of the said term, was respectively ready and willing to have found and would have found him the said T. sufficient meat, drink and lodging, and the defendant would have paid him the other sums of money by the said indenture stipulated to be paid to him, according to the form and effect of the said indenture and the said covenant in that behalf, if the said T. had not so deserted and run away, or had afterwards re-entered into the service of the defendant. And this the defendant is ready to verify, &c.

That defendant did provide &c. board and lodging, according to his covenant, whilst the plaintiff served the defendant.

And for a further plea, as to so much of the said breach of covenant in the said declaration lastly above assigned as was incurred before the said dismissal and discharge of the said &c. by the said &c. from his service by the said declaration above supposed, the defendant says, that he the defendant continually, after the making of the said articles until the said alleged dismissal and discharge of the plaintiff by the defendant from his service, did find and provide for the plaintiff good and sufficient meat, drink and lodging, suitable to his situation, according to the form and effect of the said articles of agreement and of the said covenant of him the defendant in that behalf made as aforesaid. And of this he puts himself upon the country, &c.

Plea, that defendant was ready to provide &c., but that plaintiff absented himself.

And for a further plea to so much of the said breach of covenant in the said declaration above assigned as was incurred before the said dismissal and discharge of the said &c. by the said &c, from his said service, as in the said declaration mentioned, the defendant says, that he the defendant continually, after the making of the said articles of agreement, until the said supposed dismissal and discharge of the plaintiff by the defendant from his service as aforesaid, was ready and willing to find and provide, and would during all that time have found and provided, for the plaintiff good and sufficient meat, drink and lodging, suitable to his situation, according to the form and effect of the said articles of agreement and of the said covenant of the defendant in that behalf made as aforesaid, but the plaintiff during all that time voluntarily and of his own accord, without the request or license of the defendant, found and provided for the said &c. good and sufficient meat and drink and lodging, suitable to his situation. And this he is ready to verify, &c.

ON APPRENTICE DEEDS.

That the apprentice voluntarily absented himself, and traversing the discharge by defendant. (*l*)

And for a further plea in this behalf to the said breach of covenant by the plaintiffs in the said declaration first above assigned, the defendant says, that the said J. O. after the making of the said articles of agreement, and before the time of the said supposed dismissal and discharge of the said J. O. in the said declaration mentioned, to wit, on &c. did voluntarily leave, quit and depart from the said service of the defendant without the license, leave, permission or consent, and against the will of the defendant, and hath remained and continued so absent from thence hitherto; without this, that the defendant dismissed and discharged the said J. O. from his said service, and refused to employ him in his said business of an attorney or solicitor and agent, or to instruct or cause him to be instructed therein, in manner and form as the plaintiffs have in the said breach of covenant first above assigned alleged. And of this the defendant puts himself upon the country, &c.

To action of covenant against the father for breaches by the apprentice, plea that the plaintiffs carried on the business of engineers as co-partners, that the covenants were made with them as such co-partners, and that before any breach of duty they dissolved partnership. (*m*)

See *Lloyd* v. *Blackburn*, 9 M. & W. 363.

ON CHARTER-PARTIES.

IV. ON CHARTER-PARTIES.

To declaration on charter-party for money due on demurrage, that defendant did not keep the vessel on demurrage over and above the lay days allowed by the charter-party. (*n*)

And for a further plea the defendant saith, that he did not keep the said vessel on demurrage the said days, or any part thereof, over and above the said lay days in the said charter-party mentioned, in manner and form as the plaintiff hath above alleged. And of this the defendant puts himself upon the country, &c.

To declaration on charter-party for balance of freight, and also for demurrage, that defendant did send a cargo alongside of the vessel, to be loaded on board within the days of demurrage allowed by the charter-party.

And for a further plea the defendant saith, that he the defendant did send and cause to be sent alongside of the said vessel in the river Thames such goods as he thought proper to ship and receive the same from alongside of her at ——, and send alongside of her at —— such goods as he thought fit, and receive the same from alongside of her at London, within the time limited for those purposes and days of demurrage in the said charter-party mentioned, and did not keep the said vessel any time over and above the time limited for the purpose last aforesaid and the days of demurrage as aforesaid. And of this he puts himself upon the country, &c.

(*l*) See 6 B. & C. 680.

(*m*) Where to an action against a defendant for part of the premium which he covenanted to pay on behalf of his son, the apprentice, the defendant pleaded that the justices at sessions had, on the application of the apprentice, discharged him from his apprenticeship, and ordered that no part of the premium sued for should be paid by the defendant to the plaintiff, it was held that the plea was bad, and that the justices at sessions have no power under the stat. 5 Eliz. c. 4, s. 35, on making an order for the discharge of an apprentice from his apprenticeship, to direct the return of any part of the premium already paid to the master, or the non-payment of any part of it remaining unpaid; and *semble*, per Alderson, B., that the statute does not apply to cases where a premium is given with the apprentice, but only to compulsory bindings without premium; *East* v. *Pell*, 4 M. & W. 666.

(*n*) See forms in debt, *ante*, 199. The charterer of a ship for the conveyance of a cargo from a foreign port is not liable to the owner for the unavoidable detention of the ship by the frost after the completion of the loading; *Pringle* v. *Mollett*, 6 M. & W. 80.

And for a further plea in this behalf, the defendant saith, that he the defendant was always ready and willing to send and cause to be sent alongside of the said vessel in the river Thames aforesaid, and at —— aforesaid, a full and sufficient cargo of such goods as he thought proper to ship on board of the said vessel within the time limited for those purposes and days of demurrage; yet the defendant in fact saith, that the said vessel was not tight, staunch and strong, nor was in every respect properly fitted and manned for the voyages from —— aforesaid and —— aforesaid, so as to enable the defendant safely or securely to send or cause to be sent alongside the said ship or vessel such goods as aforesaid, in order that the same might be loaded on board thereof within the times and days of demurrage aforesaid. And this the defendant is ready to verify, &c.

To declaration on charter-party for balance of freight, and for a sum due on account of demurrage, that he was ready and willing to have sent goods alongside of the vessel, but that she was not tight, staunch and strong &c.

And for a further plea in this behalf, the defendant saith, that the defendant did send and cause to be sent alongside of the said vessel in the river Thames such goods as he thought proper to ship and receive the same from alongside of her at Heligoland, and sent alongside of her at Heligoland such goods as he thought fit, and receive the same from alongside of her at London, within the time limited for those purposes and days of demurrage in the said charter-party mentioned, and did not keep the said vessel any time over and above the time limited for the purpose last aforesaid and the days of demurrage aforesaid. And of this he puts himself upon the country, &c.

Plea, that defendant did send alongside of the vessel goods within the time limited and days of demurrage in the charter-party mentioned.

And for a further plea in this behalf, as to so much of the said supposed breach of covenant first above assigned as relates to the not sending or causing to be sent alongside of the said vessel in the River Thames and at Heligoland such goods as he thought proper to ship on board thereof within the time limited for those purposes and days of demurrage, the defendant says, that he was always ready and willing to send and cause to be sent alongside of the said vessel in the river Thames aforesaid and at Heligoland aforesaid a full and sufficient cargo of such goods as he thought proper to ship on board the said vessel within the time limited for those purposes and days of demurrage; yet the defendant in fact saith, that the said vessel was not staunch, tight and strong, nor was in every respect properly fitted and manned for the voyage from London aforesaid, or from Heligoland aforesaid, so as to enable defendant safely or securely to send or cause to be sent alongside the said ship or vessel such goods as aforesaid, in order that the same might be loaded on board thereof within the time and days of demurrage aforesaid. And this the defendant is ready to verify, &c.

Plea, that defendant was always ready and willing to send alongside the vessel at Heligoland and London such full and sufficient cargo of goods &c. within the time limited, but that the ship was not tight, staunch &c. so as to enable him safely or securely to send them, in order to be loaded on board within that time.

And for a further plea in this behalf to the said supposed breach of covenant secondly above assigned, the defendant saith, that he, before the commencement of this suit, to wit, on &c. paid to the plaintiff the said sum of £——, in full satisfaction and discharge of the said sum of £—— in the said second breach of covenant mentioned, and of all the damages by the plaintiff sustained by reason of the non-payment thereof, which said sum of money the plaintiff then accepted and received of and from the defendant in full satisfaction and discharge of the said sum of £—— in the said

Plea, that before the commencement of this suit, payment of £—— in accord and satisfaction.

On Charter-Parties.

second breach of covenant mentioned. And this the defendant is ready to verify, &c.

Plea, denial that defendant did keep the ship on demurrage over and above the time in charter-party mentioned.

And for a further plea in this behalf to the said supposed breach of covenant lastly above assigned, the defendant says, that he did not keep the said vessel on demurrage the said days, or any part thereof, over and above the said lay days in the said charter-party mentioned, in manner and form as the plaintiff hath above alleged. And of this the defendant puts himself upon the country, &c.

On Policies of Insurance.

V. ON POLICIES OF INSURANCE. (o)

Plea, that coals were described in policy otherwise than they really were. (p)

And for a further plea in this behalf, the defendants say, that the said stock of coals of the plaintiff above-mentioned to have been insured as aforesaid, before and at the time of making of the aforesaid deed-poll or policy, was described otherwise than it really was. And of this they the defendants put themselves upon the country, &c.

Plea, that the goods were on fire at the time of making the policy, and that it was obtained by fraud.

And for a further plea the defendants say, that divers large quantities, to wit, 100 bushels of the said coals in the declaration mentioned to have been the stock and property of the said &c. and to have been on the said open wharf adjoining west, mentioned in the said deed-poll or policy of assurance, and by the said declaration above-mentioned to have been burnt, consumed, lost and destroyed by fire, before and at the time of the making of the said deed-poll or policy of assurance had taken fire and were burning and consuming by fire, whereof the plaintiff, before and at the time of the making of the said deed-poll or policy of assurance, to wit, on &c. aforesaid, had notice, (q) and then, with intent to defraud them the defendants, fraudulently and deceitfully obtained and effected the said deed-poll or policy of assurance in the said declaration mentioned. And this they the defendants are ready to verify, &c.

Plea, that goods were of an inflammable nature, and therefore the special hazard ought to have been inserted in the policy, according to the printed proposals.

And for a further plea the defendants say, that in and by the printed proposals, mentioned in and referred to by the said deed-poll or policy, it was expressed and declared, amongst other things, that common insurances were buildings covered with slate, tile or lead, and built on all sides with brick or stone, and goods and merchandize therein not hazardous, and where no hazardous trades are carried on or hazardous goods deposited; that hazardous insurances were timber or plaster buildings, and goods and merchandize therein not hazardous; also thatched barns and out-houses having no chimnies, or adjoining to any building having a chimney, containing far-

(o) See also the next plea. The policy was in the usual form of fire policies, and the pleas, as well as the next set of pleas, will be applicable to ordinary cases. The defendant on the trial obtained a verdict. The pleas were settled by the late Lord Tenterden when at the bar.

(p) This plea concludes to the country, because the allegation is a negative of what was averred in the declaration.

(q) As policies on goods against fire are not like *ship* insurances "*lost* or not lost," so as to cover an *existing* loss, it should seem that if the coals were even latently on fire at the time the policy was effected, and this unknown to the insured, yet the policy would be void, and therefore an averment of notice and fraud is unnecessary, and not traversable.

mer's stock or implements of husbandry, or brick or stone buildings wherein hazardous goods or trades were deposited or carried on, such as bread and biscuit bakers, brewers, carpenters, chemists, colourmen, coopers, innholders, victuallers, malt-houses, sail-makers, ship and tallow chandlers, stable-keepers, hemp, flax, pitch, tallow, tar, rosin, turpentine, hay, straw, and all manner of fodder, and corn unthrashed, apothecaries' stock, also cotton, sugar, oil and spirituous liquors, as merchandizes; likewise all shops and warehouses which have German or metal stoves with pipes. *That doubly* hazardous insurances were all other thatched buildings, and goods and merchandize therein, timber or plaster buildings wherein hazardous goods or trades are deposited or carried on; also saltpetre, sea biscuit-bakers, oil leather-dressers, tallow-melters, wax-chandlers, boat-builders, china, glass or earthenwares. And that if insurances were desired for any larger sums than were specified in the table of annual premiums, a special agreement might be made for the same; special agreements might also be made for mills and stock therein; also for mills or buildings containing any kiln, steam-engine, stove or oven used in the process of any manufactory, or stock therein; or for other insurances more hazardous than those described in the second and third heads of insurances of the said printed proposals, as sugar-bakers, distillers, varnish-makers, chemists' laboratories, manufactories of any commodity deemed hazardous, as flax-dressers, sail cloth-makers, rope-makers and floor-cloth painters, coach-makers, musical instrument-makers, umbrella-makers, and refiners of saltpetre, spermaceti and ore, cotton, flax and lint-spinners, with all the operations attending the manufacturing of these materials from the raw state into thread for the weaver, or such like, by reason of the nature of the trade, the narrowness of the place, or other dangerous circumstances, which special hazard must be inserted in the policy to render the same valid and in force. And the defendants further say, that the said coals of the plaintiff, so as aforesaid burnt, consumed, lost and destroyed by fire, at the time of the making of the said deed-poll or policy of assurance, and of the insuring thereof as aforesaid, were of an inflammable nature and quality, and that the insurance so as aforesaid made thereon was more hazardous than the insurances above in this plea particularly mentioned and described, and were specially hazardous; yet the defendants further say, that such special hazard was not inserted in the said deed-poll or policy of assurance. By reason whereof the said deed-poll or policy was and is null and void. And this they the defendants are ready to verify, &c.

Plea, that goods were wrongly described, and were so insured at a less premium than they ought to have been.

And for a further plea in this behalf, the defendants say, that the plaintiff did at the time of the making, effecting and obtaining of the deed-poll or policy of assurance, and so as aforesaid insuring his said stock of coals as aforesaid, cause the same to be described otherwise than as it then really was, so that the same was insured at a lower premium than the said special hazards in the said printed proposals above-mentioned did require. By reason whereof the said deed-poll or policy was void and of no force. And this they the defendants are ready to verify, &c.

Plea, that goods were described otherwise than they really were.

And for a further plea in this behalf, as to the said breach of covenant above assigned, the said defendants say, that the said &c. did, at the time

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of the making, effecting and obtaining of the said deed-poll or policy of assurance, and in so as aforesaid insuring his said stock of coals as aforesaid, cause the same to be described otherwise than as it then really was, so that the same was insured at a lower rate than was proposed in the aforesaid table of premiums. And this they the defendants are ready to verify, &c.

Plea (after craving oyer of and setting out conditions of insurance) *non est factum.*

And the defendants, by —— their attorney, crave oyer of the said deed-poll or policy of insurance, and it is read to them, and they also crave oyer of the conditions upon which the said company make insurances, which said conditions are referred to by the said deed-poll or policy of insurance, and indorsed thereon, and they are read to them in these words, that is to say, conditions upon which this company make insurances.—[*First*, Persons desirous of making insurance on buildings are to deliver into the office the following particulars, viz. a description of the buildings; where situated; by whom occupied; of what materials the walls and roof of each building intended to be insured are composed; whether the same are occupied as dwelling-houses, or as warehouses, manufactories, workshops, or how otherwise; houses not duly separated by party-walls are deemed brick and timber; all manufactories, which contain furnaces, kiln, stores, coal-kels, ovens, or otherwise use fire and heat, are chargeable at additional rates.—*Second*, In the insurance of goods, wares, merchandize, the building or place in which the same are to be deposited is to be described; it must also be stated whether such goods be of the kind denominated hazardous, and whether any manufactory is carried on in the premises; and if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described in the policy otherwise than they really are, so as the same be charged at a lower premium than is here specified as applicable thereto, or if any building shall contain any kiln, furnace, steam-engine, stove or oven, used in the process of any manufactory, unless mention be made thereof in the policy, it shall also be void in respect of such buildings and the goods therein.—*Third*, That no loss or damage by fire occasioned by invasion, foreign enemies, civil commotion, or any military or usurped power, will be assured or made good, or considered as insured, by this company.—*Fourth*, Persons insuring property at this office must give notice of any other insurance made by or on their behalf in the same property, whether such other insurance shall be made previous or subsequent to that which is made at this office; and such other insurance is to be indorsed on the policies, subscribed on behalf of this company, and entered at their office, otherwise this company will not hold themselves liable to pay in case of loss, and after such indorsement is made this company will pay their rateable proportions of any loss or damage by fire subsequently sustained.—*Fifth*, Leaseholders, trustees, mortgagees, persons entitled to houses and buildings in reversion, may insure their respective interests in such buildings, provided the nature of the tenure or interests therein be duly specified, and this office will fully reinstate all damages to buildings insured, or pay the amount, not exceeding the sum named.—*Sixth*, Upon the death of any person insured at this office, the policy interest therein may be continued to his executors or administrators respectively, or be transferred to the person who shall, upon such death, be entitled to the property insured, pro-

vided such heirs, executors or administrators, or other person so entitled, do procure his or her interest therein to be indorsed on the policy at the office of this company; that persons changing their dwelling-houses, shops or warehouses may preserve the benefit of their policies, if the nature and circumstance of the risk insured be not altered; but in all such cases the policy is not to be considered as remaining in force until the nature of the removal or alteration be given at the office of this company, and the same to be made by the company upon the policy.—*Seventh*, All persons insured by this company who shall sustain any loss or damage by fire are forthwith to give notice thereof to the company at their principal office in London, and as soon as possible afterwards are to deliver in as particular an account of their loss or damage as the nature of the case will admit of, and shall make proof of the same by their oath or affirmation, and produce such other evidence as the directors of this company may reasonably require, and until such affidavit and affirmation and account are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; and if there appear any fraud in the claim made to such loss, or false swearing or affirming in support thereof, the claimant shall forfeit his claim to payment thereof by virtue of his policy.—*Eighth*, In case any difference or dispute shall arise between the assured and the company, touching the amount or extent of any loss or damage, such difference shall be submitted to the judgment or determination of arbitrators, indifferently chosen, whose award in writing shall be conclusive and binding to all parties; and when any loss or damage shall have been duly proved and ascertained, the insured shall immediately receive satisfaction to the full amount of the same, without any deduction or discount whatsoever.—*Ninth*, Septennial insurers. Persons choosing to insure for seven years will be charged for six years only; also for any number of years less than seven will be allowed reasonable discount both upon the premium and the duty.—*Tenth*, Insurances may be made for any period less than twelve months.—*Eleventh*, No receipts are to be taken for any premium of insurance but such as are printed and issued from the office, witnessed by one of the clerks or agents of the office. All expenses attending the removal of goods, insured in this office, out of any house or premises on fire, or out of any house or premises adjoining or contiguous to any building on fire, will be cheerfully repaid.] Which being read and heard, the defendants say, that the said &c. [*non est factum, as ante*, 174.] And of this they put themselves upon the country, &c.

Plea, that plaintiff did not give notice of having insured at another office, contrary to fourth condition.

And for a further plea to the first count of the said declaration the defendants say, that the plaintiff did not, at the time of making the said policy of insurance in that count mentioned, and at the time of paying the said sum of &c. in that count also mentioned, give notice to the said company at the said office of the said other insurance theretofore made at the Imperial Fire-office, as in the said second count is mentioned, according to the form and effect of the said fourth condition referred to by and indorsed upon the said deed-poll or policy of insurance. And this the defendants are ready to verify, &c.

Plea, that defendant did not waive the notice.

And for a further plea to the first count the defendants say, that they the defendants did not in any manner waive, relinquish, release or discharge the

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plaintiff from indorsing the said insurance in the said British Fire-office, in the said deed-poll or policy of insurance in the said first count first mentioned, and for entering the same at the said office, in that count first mentioned, in manner and form as the plaintiff hath in that count alleged. And of this the defendants put themselves upon the country, &c.

Plea, that buildings, goods &c. were not duly described.

And for a further plea to the said first count the defendants say, that the said utensils and stock in trade in the said first count mentioned were not duly described in the building and place where the same were deposited, but the same were described in the said policy otherwise than they really were, and so as to cause the said insurance to be effected at a lower premium than ought to have been, contrary to the form and effect of the said condition referred to by and indorsed on the said deed-poll or policy of insurance. And this the defendants are ready to verify, &c.

Plea, that goods &c. were not burnt.

And for a further plea to the said first count of the declaration the defendant says, that the said utensils and stock in trade in the said first count mentioned, and therein supposed to have been burnt, consumed, lost and destroyed by fire, were not, nor was any part thereof, burnt, consumed, lost or destroyed by fire, in manner and form as the said &c. hath in that count alleged. And of this the defendants put themselves upon the country, &c.

Plea, that plaintiff did not give due notice of or duly prove the loss.

And for a further plea in this behalf to the —— count of the declaration the defendant says, that the said &c. did not give notice of the loss she had sustained to the company at their said principal office in London, and that the said &c. did not, as soon as possible afterwards, deliver at the said office as particular an account of her said loss or damage as the nature of the case would admit of, in manner and form as the plaintiff hath above in that count alleged; nevertheless, for plea in this behalf, the said &c. in fact say, that although the plaintiff did make oath of the said loss, and did then and there produce her books, documents, vouchers and other evidence, at the request of the directors of the said company, then and there being a reasonable request in that behalf; yet the plaintiff did not duly, properly and reasonably prove her said loss and damage according to the form and effect of the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance. And this the defendants are ready to verify, &c.

Plea, that plaintiff did not as soon as possible deliver in a particular account of loss, and that there was fraud within the seventh condition.

And for a further plea in this behalf, the defendant says, that the said A. did not, as soon as possible after the said loss and damage in that count mentioned, deliver in as particular an account of such loss or damage as the nature of the case would admit of, in manner and form as the plaintiff hath above in that count alleged; nevertheless, for plea in this behalf, the said &c. say, that in the claim made for the said loss and damage in the said count mentioned and set forth, there appeared to be fraud within the true intent and meaning of the said seventh condition, referred to and indorsed on the said deed-poll or policy of insurance, that is to say, fraud in taking the quantity, nature and value of the sugars, utensils and other stock in trade in that count supposed to have been burnt, consumed and destroyed by fire, contrary to the said seventh condition, referred to by and indorsed on the

said deed-poll or policy of insurance. And this the defendant is ready to verify, &c.

Plea, that plaintiff made a false affidavit of the loss &c.

And for a further plea in this behalf, the defendant says, that the said &c. in order to support her claim for the said loss or damage in that count mentioned, did on &c. before &c. magistrate, at the public office, —— in the county of ——, make a certain affidavit. And the said &c. in fact further says, that in support of the said claim for the said loss and damage in that count mentioned, there was false-swearing within the true intent and meaning of the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance, that is to say, false swearing in this, to wit, the said &c. then swore that the amount annexed to the said affidavit contained a true statement of the loss and damage of her the said &c. whereas the said amount did not contain a true statement of the said loss and damage, contrary to the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance. And this the defendant is ready to verify, &c.

Plea, that plaintiff was requested by directors to deliver in a particular account of loss, but refused, contrary to the seventh condition.

And for a further plea in this behalf the defendants say, that the said &c. after the said loss and damage by fire in that count mentioned, to wit, on &c. was required by the directors of the said company to deliver in an account of the said loss or damage, specifying in such account the amount of the loss and damage suffered in the stock in trade and utensils in each distinct building of the said premises so insured in the said policy in that count mentioned, the same request then being a reasonable request in that behalf, but the said &c. then neglected and refused to deliver in such account as aforesaid, and hath not delivered the same to the directors of the said company, contrary to the form and effect of the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance. And this the defendants are ready to verify, &c.

Plea, that stock, &c. was improperly described, whereby insured at a lower premium, contrary to second condition.

And for a further plea in this behalf to the —— count of the declaration, the defendant says, that the said utensils and stock in trade in the said deed-poll or policy of insurance in the said last count mentioned were not truly described in the building and place where the same were deposited, but the same were described in the said policy otherwise than they really were, and so as to cause the said insurance to be effected at a lower premium than ought to have been, contrary to the form and effect of the said second condition, referred to and indorsed on the said deed-poll or policy of insurance. And this the defendant is ready to verify, &c.

Plea, that the premises were insured in another office, and no notice duly given to defendants' office.

And for a further plea in this behalf to the —— count of the declaration, the defendants say, that the said utensils and stock in trade in the said sugar house in the said last count mentioned were, before the making of the said deed poll or policy of insurance, insured for a certain sum of money, to wit, the sum of £——, in a certain office called the British Fire-office, being another office than that mentioned in the said deed-poll or policy of insurance; and that the said, &c. did not give notice of such insurance to the said company at their said office, neither did she cause the same to be indorsed upon the said deed-poll or policy of insurance, but on the contrary

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thereof altogether neglected so to do, contrary to the form and effect of the fourth condition, referred to by and indorsed upon the said deed-poll or policy of insurance. And this the defendants are ready to verify, &c.

Plea to an action of *covenant*, on a policy of insurance on a ship, that the policy was obtained by fraud and misrepresentation, and by a *material misrepresentation*, stating it. (*r*)

And for a further plea in this behalf, the defendants say, that the alleged deed-poll or policy of insurance in the declaration mentioned was obtained from the defendants by fraud and misrepresentation, to wit, by the said plaintiff's wrongfully, unjustly, unlawfully, falsely and fraudulently, heretofore, and before the defendants received the said deed-poll or policy, to wit, on the —— day of ——, A. D. —— aforesaid, making a certain false and fraudulent material statement and representation to the defendants, that is to say, that the said ship or vessel had arrived at St. Michael's the latter end of December then last past from Terceira, and that no account had been received from her since such her said arrival; whereas in truth and in fact, before the making of the said statement and representation, to wit, on the —— day of ——, A. D. ——, the said —— had received an account of the said ship or vessel having sailed, to wit, from St. M. on her homeward voyage, after her said arrival at St. M., to wit, on the —— day of —— then last past, and which said account and information was then material, and which said account and information then ought to have been stated and communicated to the defendants before they sealed the said alleged deed-poll or policy of insurance. And this the defendants are ready to verify, &c.

Second plea, that no goods had been shipped. (*s*)

And for a further plea in this behalf, the defendants say, that no such goods had been or were shipped or loaded at St. Michael's aforesaid in and on board of the said ship or vessel, to be carried or conveyed therein from St. Michael's aforesaid to Dublin aforesaid, in manner and form as the plaintiffs have in that behalf alleged. And of this the defendants put themselves upon the country, &c.

Third plea, that the party insured was not interested in freight of the said ship. (*t*)

And for a further plea in this behalf, the defendants say, that the said —— were not interested in the freight of any goods shipped and loaded on board the said ship or vessel on the said voyage, in manner and form as the plaintiffs have in that behalf alleged. And of this the defendants put themselves upon the country, &c.

(*r*) Where the rules of an insurance association provided that the managing underwriters should survey each ship insured in hull and materials once a year, without distinction, and order such stores and repairs as they might deem necessary, which stores must be got and repairs done on due notice being given, otherwise the ship *should not be insured*, and the policies were all to be time policies for one year; it was held, that the effect of not complying with an order of the managing underwriters was, that the ship must be considered unseaworthy, and the policy of insurance which had *before* been effected on her void; *Stewart* v. *Wilson*, 12 M. & W. 11.

(*s*) To a declaration by shipowners against the underwriter of a time policy upon the hull and stores, for the loss occasioned by throwing pigs overboard to preserve the vessel, a plea that the pigs had been stowed on the deck, by reason whereof the defendant was not liable to contribute any average loss sustained by their jettison, is bad, as the mere fact of stowing the pigs on deck was no answer to the action; *Milward* v. *Hibbert*, 2 G. & D. 142; see also *Broderick* v. *Hollingsworth*, 2 N. & P. 608.

(*t*) A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy, except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit; *Powles* v. *Innes*, 11 M. & W. 10; *Sutherland* v. *Pratt*, 12 M. & W. 16. A plea that the goods were lost or de-

VI. ON COVENANTS TO CONVEY OR PURCHASE.

On Covenants to Convey or Purchase.

See fully the pleadings in *Rippinghall* v. *Lloyd*, 5 Bar. & Adol. 744.

VII. ON LEASES IN GENERAL.

On Leases in General. (u)

Plea to covenant for rent, *a tender on the land before sunset.* (x)

And the defendant, by E. F. his attorney, as to the sum of [£5,] parcel of the said sum of £—— in the declaration mentioned, saith, that he the defendant was present at the said demised dwelling-house and premises, on the said —— day of ——, A. D. ——, being the day on which the said sum of [£5] became due and payable as aforesaid, for a reasonable and long space of time, to wit, for the space of three hours next before the setting of the sun in the same day, being a convenient and sufficient time before the setting of the sun on that day for the counting of the money with which the defendant wished and intended to pay the rent aforesaid; and also at and for a reasonable and long time after the setting of the sun in the same day, and during all the time aforesaid, was there ready to pay and offered to pay the said [£5] to the plaintiff, but that neither the plaintiff nor any other person on his behalf, during the said time or any part thereof, was there ready to receive the same; and the defendant further saith, that he the defendant hath always since that day, at and upon the said demised dwelling-house and premises, been and still is ready to pay the same to the plaintiff, and the defendant now brings the said sum of [£5] here into Court, ready to be paid to the plaintiff if he will accept the same. And this he the defendant is ready to verify, &c.

Plea, that lessor was seised for life, and not in fee. (y)

And for a further plea in this behalf, the defendant says, that the said E. F. deceased, at the time of the making of the said indenture, was seised only in his demesne as of freehold, for the term of his natural life, of and in the said demised premises with the appurtenances, and continued so seised thereof until and at the time of his death, and that after the making of the said indenture, and before the expiration of the said term, to wit, on, &c. the said E. F. died; whereupon the said indenture and the term thereby

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maged before the plaintiff acquired any interest therein, is bad; *Sutherland* v. *Pratt*, 11 M. & W. 296.

(u) See forms of pleas in *debt* on leases &c. *ante*, 282; the assignee of a lease continues liable to be sued for the breach of a covenant running with the land incurred in his own time, although the action against him be not commenced until after he has assigned; *Harley* v. *King*, 2 Crom. M. & Ros. 18; 1 Gale, 100.

(x) See the form, Plead. A. 341; 2 Rich. C. P. 42. And as to the law, see 4 Taunt. 549; Bac. Abr. Tender, H. 1. The tender of rent may be on the land, unless otherwise stipulated; 1 Bac. Abr. 670, Condition, p. 4. See observation, *ante*, 202, as to pleading *rien in arrere* and accord and satisfaction, see *ante*, vol. i. Index, "*Lease*."

(y) See 2 Wils. 143, in which, to covenant by an heir, a similar plea was held sufficient on demurrer, and see the form 8 T. R. 488; 1 New Rep. 160. A lessee or assignee cannot plead *nil habuit* or a general traverse of the lessor's estate, or that he had only an *equitable* interest, but he may show that the lessor was entitled to a *different* estate; see 2 Stra. 817; 8 T. R. 487; 1 New Rep. 160; 2 Saund. 207 b, 418, note 1; Chit. jun. on Contracts; *ante*, vol. i. Index, "*Lease*." As to what plea of this nature defendant may plead, see 4 Moore, 303; 2 Bing. 54, 10, and cases there collected. See plea setting up the interest of a third party in the premises, who should have been joined in the action, and law thereon, *Foley* v. *Addenbrooke*, 3 G. & D. 64.

On Leases in General.

created wholly ceased and determined; without this, that at the time of the making of the said indenture, the reversion of and in the said demised premises, with the appurtenances, belonged to the said E. F. and his heirs, in manner and form as the plaintiff hath above in his said declaration in that behalf alleged. And of this the defendant puts himself upon the country, &c.

Surrender by lessee.

See a form of plea, 5 Taunt. 27.

Plea by assignee, traversing the assignment to him. (*z*)

And for a further plea in this behalf, the defendant says, that all the estate, right, title, interest and term of years then to come and unexpired, property, claim and demand whatsoever of the said E. F. of and in the said premises, with the appurtenances, by assignment thereof duly made, did not come to and vest in the defendant in manner and form as the plaintiff hath in his said declaration in that behalf alleged. And of this the defendant puts himself upon the country, &c.

Plea, that assignee assigned over to third person.

See the form referred to in note. (*a*)

Premises not out of repair. (*b*)

The defendant saith, that [*here deny the breach in the words assigned in the declaration, which may perhaps be thus:*] the said messuage and tenement, farm-house and out-houses thereunto belonging, were not, nor are, nor was, nor is any part thereof ruinous, prostrate, fallen down, or out of repair, in manner and form as the plaintiff hath above thereof complained against him the defendant. And of this the defendant puts himself upon the country, &c.

To breach of covenant for not working mines demised to the defendant in a proper and workmanlike manner, and suffering them to lie wholly ungotten, plea, that the said mines were never at any time before their demise worked or gotten, nor did the defendant at any time since or during the demise work or get the mines.

See *Quarrington* v. *Arthur*, 10 M. & W. 335.

(*z*) The words of the traverse of the assignment are to be in the negative of that part of the declaration. If the defendant proves that he was assignee of *part* only of the premises, the verdict on this issue must be entered for him; *Curtis* v. *Spitty*, 1 Bing. N. C. 756. As to when this plea cannot be pleaded to an action of *covenant*, 4 Taunt. 642. If the defendant be assignee of *part* only, he should plead in abatement, 5 B. & C. 479; or plead in bar only as to one undivided share, per Littledale, J. 5 B. & C. 484. See a plea by a lessee of a *surrender*, 5 Taunt. 27. In an action by a reversioner against assignees of a bankrupt for several breaches of covenant in a lease, the Court of Common Pleas refused to allow the defendants to plead *non est factum*, and also that the premises did not come to them by assignment; 2 M. & P. 19; see plea in *Thompson* v. *Bradbury*, 1 Bing. N. C. 326; 3 Dowl. 147. See similar form of traverse to declaration alleging that *part* of the demised premises vested in the defendant, and what facts sustain such an allegation in the declaration, *Wollaston* v. *Hakewill*, 3 M. & G. 297.

(*a*) *Harley* v. *King*, 1 Gale, 100; 2 Crom. M. & Ros. 18. Replication, that the breach was before assignment. *Semble*, the plea was bad for not averring that defendant's assignment was before breach of covenant complained of.

(*b*) See form, Plead. A. 316; Morg. 489. The plea to the breach of covenant for not repairing should be conformable to the breach, and may be either that the defendant did repair &c. in the words of the covenant, or that the premises were not out of repair, as above, in the negative of the breach usually assigned in the declaration. It seems preferable to plead that defendant did repair, and that the premises were not dilapidated, negativing the breach as assigned in the declaration. See plea that the state and condition of the premises was occasioned by a sudden and unforeseen act, and that a reasonable time for the defendant to repair had not elapsed, and a similar plea alleging that the plaintiff had commenced to repair before the expiration of a reasonable time, and so prevented the defendant from repairing, and law thereon, *Green* v. *Eales*, 1 G. & D. 468. As to condition precedent, see *Coombe* v. *Greene*, 11 M. & W. 480.

See *Lawton* v. *Sutton*, 9 M. & W. 795.

To breach of covenant by lessor against lessee of mines for non-payment of the wages, according to covenant of H. employed by the plaintiff to keep accounts, &c. plea, that H. was an unfit and improper person.

Plea under 6 Geo. 4, c. 16, s. 75, to a declaration in covenant, for rent &c. that the assignees of defendant (bankrupt) accepted the lease. (*c*)

And for a further plea in this behalf, the defendant says, that &c. [*here set out the defendant's being a trader, the petitioning creditor's debt, the act of bankruptcy, the fiat issued and the defendant's being found a bankrupt, reference to such adjudication, memorandum thereof and reference thereto, appointment of official assignee, reference to memorandum thereof, notice of fiat in Gazette, and for bankrupt to surrender, choice of creditors' assignees, confirmation of such choice, assignees accept the appointment, reference to memoranda, defendant's surrender and examination and conformity, as in the form, ante,* 69.] And the defendant further saith, that before any part of the said rent in the said declaration mentioned became due and in arrear, and also before the committing of the said alleged breaches of covenant in the said declaration assigned, to wit, on &c. the said C. D. and E. F. so being assignees of the estate and effects of the defendant, as such bankrupt as aforesaid, accepted the said lease so granted by the plaintiff to the defendant, and the benefit therefrom, as part of the said bankrupt's estate and effects, according to the form of the statute in such case made and provided; and the defendant then and before the committing of either of the said breaches of covenant in the said declaration mentioned, became and was wholly discharged from liability to be in any manner sued in respect or by reason of any subsequent non-observance or non-performance of the condition, covenants or agreements in the said lease contained. And this the defendant is ready to verify, &c.

See form in *Simons* v. *Farren*, 1 Bingh. N. C. 126.

Plea to covenant for rent, a breach of covenant by defendant, and consequent forfeiture, and that heir of lessor recovered in ejectment, and that defendant was obliged to attorn before rent due. (*d*)

Plea to covenant for rent, that the lease was entered into by the plaintiff and defendant and the premises let to the defendant for the express purpose of being used by the defendant in drawing oil of tar, and boiling oil and tar, contrary to the provisions of the Building Act, 25 Geo. 3, c. 77. (*e*)

And for a further plea in this behalf to the [first] count of the declaration the defendant says, that the indenture in that count mentioned was made after the making and passing of a certain act of parliament made and passed in the twenty-fifth year of the reign of his late Majesty King George the Third, intituled "An Act to amend so much of an Act passed in the fourteenth year of the reign of his Majesty, for the further and better regulation of buildings and party walls, and for the more effectually preventing mischiefs by fire within the cities of London and Westminster," by which statute it was among other things enacted, "That from and after the 1st day

(*c*) As to this defence, see the statute and cases collected Archbold's Bank. Laws, 123. To covenant on assignment of a policy of insurance on the life of the defendant, with covenants to pay the premiums, and averring for breach that the defendant had not so paid them, a plea of the defendant's bankruptcy is no answer, as the liability to pay the premiums constituted no debt either contingent or otherwise, and was not proveable under the defendant's commission; *Toppin* v. *Field*, 3 G. & D. 340.

(*d*) An action of covenant lies for rent reserved by indenture and accruing before a re-entry for a forfeiture, notwithstanding the lessor under such re-entry is to have the premises again, "as if the indenture had never been made;" *Hartshorne* v. *Watson*, 4 Bing. N. C. 178.

(*e*) See *The Gas Light and Coke Company* v. *Turner*, 5 Bing. N. C. 667; S. C. on error, 6 Bing. N. C. 324.

On Leases in General.

of August, 1785, it should not be lawful for any person or persons within that part of Great Britain called England to distil or boil any turpentine or tar, or to draw any oil of turpentine and rosin by distilling turpentine, or to draw any oil of tar or pitch by distilling or boiling tar, or to boil any oil and turpentine together, or to boil any oil or tar together, above the quantity of ten gallons at one time of all or any of the said commodities, in any workhouse or place contiguous to any other building, or in any place nearer to any other building than the distance of seventy-five feet at the least [except in houses or buildings then in use for carrying on such manufactories, and then legally entitled to be used for those purposes], upon pain that every person offending therein should for every such offence forfeit and pay the sum of £100." And the defendant further says, that the said tenements and premises with the appurtenances in the indenture in the said [first] count mentioned, were not before or at the time of the making and passing of the said act used for carrying on any such manufacture, and were not then legally entitled to be used for those purposes or any of them. And the defendant further says, that at the time of the sealing and making of the indenture in the said [first] count mentioned, and from thence continually hitherto, the said tenements and premises with the appurtenances were situate and being in that part of Great Britain called England, and were each and all of them workhouses and places contiguous to other buildings, and in places nearer to other buildings than the distance of seventy-five feet. And the defendant further says, that the said indenture was made and entered into by and between the plaintiffs and the defendant in manner and form as in the said [first] count mentioned, and that the tenements and premises with the appurtenances in that count mentioned were demised and let to the defendant for the express purpose of being used for and applied to the drawing oil of tar or pitch by distilling and boiling tar, and of boiling oil and tar together by him in larger quantities than the quantity of ten gallons at one time of the said commodities respectively, contrary to the form of the said statute, whereby the said indenture was wholly void in law. And this the defendant is ready to verify, &c.

Plea in covenant for rent, that the premises came to defendant as executor or administrator, and are of no value, &c.

See the forms of pleadings in *Tremeere* v. *Morison*, 1 Bing. N. C. 89; *Ruberry* v. *Stevens*, 4 Bar. & Adol. 241; 1 Chitty's Gen. Prac. 539, 510; *Remnant* v. *Bremridge*, 2 Moore, 94; *Harris* v. *Goodwyn*, 2 M. & G. 405; and see the forms in debt, *ante*, 208.

VIII. OTHER PLEAS IN COVENANT.

Other Pleas in Covenant.

See the pleas to *debt* on *leases*, &c. *ante*, 202, which may readily be adapted to the action of covenant, and see the great variety of pleas in covenant on different deeds, indexed in 5 Wentw. Index cxxvii. to cxliv. and Com. Dig. Pleader, vol. ii. 4 to 18. Pleas in covenant so much depend on the particular facts of each case, that it would not be practicable, in a concise collection of precedents of this nature, to give forms in every case.

1. Tender.

Tender.

Tender as to part. (*f*)

And the defendant, by E. F. his attorney, as to the said breach of covenant first above assigned, so far as the same relates to £8 [*the sum tendered*] parcel of the said sum of £50, in the said declaration mentioned, saith, that after the time when the said sum of £8, parcel &c. became due and payable from the defendant, and before the commencement of this suit, to wit, on &c. he was ready and willing and then tendered and offered to pay to the plaintiff the said sum of £8, parcel &c. to receive which of the defendant he the plaintiff then wholly refused; and the defendant further saith, that he hath always from the time when the said sum of £8 became due and payable hitherto been ready to pay, and still is there ready to pay to the plaintiff the said sum of £8, parcel &c. and he now brings the same here into Court ready to be paid to the plaintiff if he will accept the same. And this the defendant is ready to verify, &c.

2. Set-off.

Set-off.

And the defendant as to the alleged breach of covenant [first] above assigned [*this must be according to the fact, a set-off can only be pleaded to a breach of covenant to pay money*], says, that the plaintiff before and at the time of the commencement of this suit was and still is indebted to the defendant in a large sum of money, to wit, the sum of £——, for &c. [*here state the subject-matter of the set-off*], which said sum of money so due and owing from the plaintiff to the defendant exceeds the damages sustained by the plaintiff on occasion of the said alleged breach of covenant first above assigned as to the said sum of £——, and out of which said sum of money so due and owing from the plaintiff to the defendant, he the defendant is ready and willing and hereby offers to set off and allow to the plaintiff so much thereof as will be sufficient to satisfy the damages by him sustained on occasion of the same breach of covenant first above assigned, according to the form of the statute in such case made and provided &c. And this the defendant is ready to verify, &c.

3. Release.

Release.

See forms of pleas of *release* in assumpsit, *ante*, 112; and in debt, *ante*, 172; and as to releases in covenant, *Simons* v. *Johnson*, 3 Bar. & Adol. 175; and as to pleas of *waiver* of claim for stipulated damages, *Denton* v. *Richmond*, 3 Tyrw. Rep. 620.

To action of covenant on a guarantee, plea of release of principal by plaintiff.

See *Bain* v. *Cooper*, 8 M. & W. 751; 9 M. & W. 701, S. C.

(*f*) A tender may be pleaded in covenant for the payment of money; 7 Taunt. 486; 1 Moore, 200, S. C.; 5 Mod. 18; 1 Ld. Raym. 566; 12 Mod. 376; *ante*, vol. i. Index, "*Tender*;" but see Gilb. C. P. 63; Gilb. Debt, 434, 443, *semble contra*.

4. Statute of Limitations.

Plea of Statute of Limitations, 3 & 4 W. 4, c. 42, s. 3, to action on specialty, &c.

See a form Petersdorff, 275. See also *Ex parte Jones*, 4 You. & C. 466.

To an action of covenant on agreement under seal, plea that the stipulation was an unreasonable restriction of trade. (*g*)

See *Mallan* v. *May*, 11 M. & W. 653.

(*g*) Where the defendant gave a bond to the plaintiff (a coal merchant in London), by which, after reciting that the plaintiff at the request of the defendant had received and taken the defendant into his service in the capacity of town traveller and collecting clerk, it was conditioned (*inter alia*), that the defendant should not, within two years after leaving the plaintiff's service, solicit or sell to any customers of the plaintiff; that he should not follow or be employed in the business of a coal merchant for nine months after he should have left the *employment* of the plaintiff; and that he should not leave his *employment* without giving a month's notice; it was held (Lord Abinger, C. B., *dissentiente*) that this condition prevented the defendant from setting up in business as a coal merchant on his own account, or being employed in that business by another person for the time limited; and also on motion for arrest of judgment, that the bond was void on the ground that this was a restraint of trade unlimited in point of space; *Ward* v. *Byrne*, 5 M. & W. 548.

X. PLEAS IN BAR IN DETINUE. (*a*)

THE Reg. Gen. Hil. T. 4 W. 4, reg. III. Detinue, orders, that *the plea of* non detinet *shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea;* see *Richards* v. *Frankum*, 6 M. & W. 420; 8 Dowl. 346, S. C.; *Mason* v. *Farnell*, 1 Dowl. & L. 580. Under this plea the plaintiff is entitled to a verdict on proof that the defendant has not returned the chattel to the plaintiff on demand, having previously delivered it under a supposed contract of sale to a third party; *Jones* v. *Dowle*, 9 M. & W. 19.

Reg. Gen. Hil. T. 4 W. 4, reg. III. *Non detinet* only to put in issue the fact of detention of the specified goods, and not plaintiff's property therein, or other ground of defence.

In the Queen's Bench [*or* " C. P." *or* " Exchequer."]

The —— day of ——, 18—.

C. D. ats. A. B. } And the defendant, by E. F. his attorney, saith, that he doth not detain the said [goods and chattels] in the said declaration specified, or any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant puts himself upon the country, &c.

Non detinet. (*b*)

Observations.]—According to the above Reg. Gen. Hil. T. 4 W. 4, every ground of defence must be *traversed in particular*, such as a denial of the plaintiff's property in or possession of the goods, and every special ground of defence must be pleaded specially. But as the alleged *bailment* to the defendant is not material or traversable, and the *detainer* is the gist of the action, a plea denying such bailment would be demurrable; *Walker* v. *Jones*, 2 Crom. & Mees. 672; *Gladstone* v. *Hewitt*, 1 Tyr. 450; 1 Crom. & Jervis, 565. The plea of not possessed puts only the property of the plaintiff in issue; and if the defendant has any right to detain, arising out of a joint interest or out of a lien or pledge, he must plead such right specially; *Mason* v. *Farnell*, 1 D. & L. 576, overruling *Lane* v. *Tewson*, 12 A. & E. 116; 1 G. & D. 584, S. C.

What other traverse or plea allowed.

And for a further plea in this behalf, the defendant says, that the plaintiff was not lawfully possessed of the said [indentures] in the said declaration mentioned or either of them, in manner and form as the plaintiff hath above in his said declaration in that behalf alleged. And of this the defendant puts himself upon the country, &c.

Plea that the plaintiff was not lawfully possessed.

(*a*) See also pleas in *Trover*, *post*, some of which may be readily applied in *Detinue*.

(*b*) See the forms of different pleas in detinue, 7 Wentw. 637, 647 to 662; and see *ante*, vol. i. Index, "*Detinue*," and Com. Dig. Pleader, 2 X. 3, &c.

IN DETINUE.

In detinue for cloth, plea of lien for fulling it. (*c*)

And for a further plea in this behalf, the defendant says, that the plaintiff delivered to the defendant the said goods and chattels in the declaration mentioned, (*d*) to wit, the said cloths, to be by him, in the way of his trade, milled and prepared for certain reward, and on the terms that the price and value of the work to be done by the defendant in milling and preparing the said cloths as aforesaid should be paid upon the completion of the milling and preparing of the said cloths; and that the defendant should have a lien on the said cloths for the price and value aforesaid, and be entitled to detain the same as a security for the payment of such price and value to the defendant; and the defendant further says, that he received the said cloths upon those terms, and milled and prepared them accordingly; and that the reasonable price and value of the said work therefore payable to the defendant amounted to a large sum of money, to wit, the sum of £——, which money remaining due, the defendant detained and still does detain the said cloths as such lien and security for its payment. And this the defendant is ready to verify, &c.

Plea that the indenture was executed in trust for a third person, and was delivered to her to dispose of as she might think fit, and she pledged it with defendants for valuable consideration.

And for a further plea in this behalf, as to the detaining the said indenture of lease in the said declaration mentioned, the defendant says, that the said indenture heretofore, to wit, on the said &c. aforesaid, was, by and with the privity and consent of the bankrupt, made and executed to him the said Y. Z., in trust for and to and for the use and benefit of one L. M. since deceased, in her lifetime, and that the said Y. Z. did accordingly, after the execution of such indenture, to wit, on &c. aforesaid, deliver the said indenture to the said L. M., to be by her had and held and used and disposed of to and for her own use and benefit, and in such a way and manner as she should think proper; and the defendant further says, that the said indenture remaining and continuing in the custody and possession of the said L. M. for the purpose aforesaid, she the said L. M. afterwards, and before the commencement of this suit, to wit, on &c. delivered the said indenture to and deposited and lodged* the same with the defendant, to be by him kept as a pledge and security for and until the payment of all such sum or sums of money as were then due or might thereafter become due to him the defendant for the goods by him furnished and supplied to the

(*c*) See *Coombs* v. *Noad*, 10 M. & W. 127. Where to trover for a policy of insurance the defendant, after stating the existence of mutual accounts between him and the assured, pleaded a lien for a general balance due to him as an insurance broker, and the plaintiff replied a bill of exchange given and taken as payment for this balance, and not due at the time of the conversion in question, it was held that the defendant could not, without pleading it as a defence, rely also on the mutual credit between the parties to justify his detention of the policy; *Hewison* v. *Guthrie*, 2 Bing. N. C. 755; and although this might not now be held to be the case in trover, it would probably be so in detinue.

(*d*) The plea does not however apply to all the goods mentioned in the declaration, but only to those *detained* by the defendant; and therefore, where the declaration was for certain goods, to wit, 1000 yards of broad cloth and two pieces of other cloth, and the defendant by his plea (as in the text) claimed a lien for fulling the cloths mentioned in the declaration, and it appeared at the trial that originally eight pieces of cloth had been delivered at the same time to the defendant to be fulled, and that six out of the eight pieces had afterwards been re-delivered, it was held that the plea only extended to the two pieces actually detained, and that the defendant could not under this plea set up a claim of lien for fulling more than two pieces, but should have asserted specifically his claim in respect of the eight; *Coombs* v. *Noad*, 10 M. & W. 127; 2 Dowl. N. S. 315, S. C.; see "*Replication of Tender*," *post*. A claim of lien in respect of a general balance is not a waiver of a lien for a charge on a particular occasion, and does not dispense with the necessity of a tender of that sum; *Scarfe* v. *Morgan*, 4 M. & W. 270.

said L. M. And the defendant further says, that certain sums of money, amounting in the whole to a large sum of money, to wit, the sum of £——, remain and still are wholly due and unpaid to him the defendant for goods by him furnished and supplied to the said L. M., *and a great part of which said goods were so furnished and supplied by the defendant after the delivery of the said indenture to him as aforesaid, and upon the faith and security thereof;* wherefore the defendant doth detain the said indenture as he lawfully may for the cause aforesaid. And this the defendant is ready to verify, &c.

Plea, that the lessee assigned the indenture to another person, who pledged it with defendant.

And for a further plea in this behalf, the defendant says, that after the making of the said indenture, to wit, on the &c. aforesaid, the said Y. Z., for a certain good and valuable consideration, in due form of law *delivered, assigned, transferred and set over* the said last-mentioned indenture, and all his the said Y. Z.'s right and interest therein to the said L. M. &c., and then delivered the said indenture to the said L. M. in her lifetime, who afterwards and before the commencement of this suit, to wit, on &c. aforesaid, delivered the said indenture to, and deposited and lodged the same with the defendant, to be by him kept as a pledge and security for and until the payment of all such sum and sums of money as were then due or might thereafter become due to him the defendant for goods by him furnished and supplied to the said L. M. [*Here aver the sale and delivery of goods by defendant to L. M. as in last plea, leaving out the lines in italics.*]

Plea, that the lessee delivered the indenture to a third person, to be disposed of by her as she should think fit, and that she pledged it with defendant.

And for a further plea in this behalf, the defendant says, that after the making of the said indenture, to wit, on &c., the plaintiff, for a certain good and valuable consideration, delivered the said indenture to the said L. M., to be by her had and held and used and disposed of to and for her own use and benefit, and in such way and manner as she should think proper; and the defendant further says, that the said indenture remaining and continuing in the custody and possession of the said L. M. for the purpose last aforesaid, the said L. M. afterwards, and before the commencement of this suit, to wit, on &c., delivered the said indenture to and deposited and lodged [*same as the plea, ante, 242, from the asterisk to the end.*]

Plea, stating several deliveries of the lease and a deed of trust, whereby one of defendants was appointed trustee, and he in his own right, and the other defendant as his servant, justifies detention of the lease.

And for a further plea in this behalf, the defendants say, that the said indenture, heretofore, to wit, on &c., was, by and with the privity and consent of the plaintiff, made and executed to him the plaintiff, in trust for and to and for the use and benefit of one L. M. in her lifetime, and that the plaintiff did accordingly, after the execution of such indenture, to wit, on &c. aforesaid, deliver the said indenture to the said L. M., to be by her had and held and used and disposed of in such way and manner as she should think proper; and the defendants further say, that the said indenture remaining and continuing in the custody and possession of the said L. M. for the purpose last aforesaid, she the said L. M. afterwards, to wit, on &c. aforesaid, delivered the said indenture to the said G. N., to be by him had and held and used and disposed of to and for his own use and benefit, and in such way and manner as he should think proper; and the defendants further say, that the said indenture remaining and continuing in the custody and possession of the said G. N. for the purpose last aforesaid, and the said

In Detinue. G. N. being indebted as is hereinafter mentioned, he the said G. N. afterwards, and before the commencement of this suit, to wit, on &c., for a certain good and valuable consideration, in due form of law assigned, transferred and set over (amongst other things) the said last-mentioned indenture and all his the said G. N.'s right and interest therein to one J. G. and the defendant W., in trust (amongst other purposes) to sell and dispose of the said indenture, and to pay and apply the produce thereof unto and amongst certain other creditors of the said G. N. *whose names and seals were and are respectively subscribed and set to a certain indenture, bearing date the day and year last aforesaid, and made between the said G. N. of the first part, and the said J. G. and the said defendant W. as creditors of the said L. M. deceased, the late wife of the said G. N. or of the said G. N. in respect of debts contracted by his said late wife, as mentioned in the said last-mentioned indenture of the second part, and the several other persons whose names and seals were thereto subscribed and set, also creditors of the said L. M. or G. N., of the third part,* in satisfaction and discharge of their said several debts, and then delivered the said indenture in the declaration mentioned to the said J. G. and the said W. as such trustees as aforesaid; and that the said J. G. and W. then had and received the said indenture in the said declaration mentioned accordingly, and then accepted and took upon them the execution of the trusts upon which the same was so assigned as aforesaid; and the defendants further say, that the said last-mentioned indenture hath not been as yet sold or disposed of by them the said J. G. and W. or either of them, for the payment whereof the same was assigned as aforesaid, nor have the said debts been as yet paid or satisfied, but the same are still wholly due and owing; wherefore the said W., as one of such trustees as aforesaid, *in his own right, and the said J. M. as his servant and by his command,* detain the said last-mentioned indenture as they lawfully may for the cause aforesaid. And this the defendants are ready to verify, &c.

Plea by one of defendants, that the lessee assigned the indenture to another person, who assigned the same to defendants.

And for a further plea in this behalf, the defendants say, that after the making of the said indenture, to wit, on the said &c. aforesaid, the plaintiff, for a certain good and valuable consideration, delivered the said indenture in the declaration mentioned to one G. N. to be by him held and used and disposed of to and for his own use and benefit in such way and manner as he should think proper; and the said W. and J. M. further say, that the said indenture remaining and continuing in the custody and possession of the said G. N. for the purpose last aforesaid, he the said G. N. afterwards and before the commencement of this suit, to wit, on the said &c. for a certain good and valuable consideration, in due form of law assigned, transferred and set over (amongst other things) the said indenture and all his the said G. N.'s right and interest therein to one J. G. and the said W., and then delivered the said indenture to the said J. G. and W.; wherefore the said W. in his own right, and the said J. M. as his servant and by his command, detain the said indenture, as they lawfully may, for the cause last aforesaid. And this the defendants W. and J. M. are ready to verify, &c.

Plea to detinue for a promissory note, that the plaintiff deliver-

And for a further plea in this behalf, the defendant says, that heretofore and before the commencement of this suit, to wit, on &c. the plaintiff delivered the said promissory note in the said declaration mentioned to, and

deposited and lodged the said promissory note with, the defendant, to be by him kept as a pledge and security for the repayment of a certain sum of money, to wit, the sum of £50, then lent and advanced by the defendant to the plaintiff upon the faith and security of the said promissory note, and which said sum of £50 hath not at any time before the commencement of this suit been repaid to the defendant, but still remains wholly due and unpaid to him the defendant; wherefore the defendant hath from thence hitherto detained and still detains the said promissory note in the declaration mentioned, as he lawfully might and may for the cause aforesaid. And this the defendant is ready to verify, &c.

ed the note to the defendant as a security for a debt due to defendant. (*e*)

And for a further plea in this behalf, as to the said goods, chattels and effects in the said first count mentioned, the defendants say, that before and at the time of the detaining of the said goods, chattels and effects in the said first count mentioned, the said plaintiffs and the said defendant C. D. were jointly and together interested in and the owners and proprietors of the same goods, chattels and effects, that is to say, as tenants in common thereof, wherefore the said defendant C. D. in his own right, and the said E. F. as his servant, and by his command, at the said time when &c. detained the said goods, chattels and effects in the said first count mentioned, as they lawfully might for the cause aforesaid. And this the defendants are ready to verify, &c.

Plea, that defendants and plaintiffs were tenants in common of the goods. (*f*)

By Assignees of a Bankrupt.

And for a further plea in this behalf, the defendant says, that the said E. F. and G. H. did not become bankrupts, according to the force, form and effect of the several statutes concerning bankrupts, in manner and form as by the said declaration is supposed. And of this the defendant puts himself upon the country, &c.

Plea to detinue at suit of assignees, that the party did not become bankrupt.

And for a further plea in this behalf, the defendant says, that the said E. F. and G. H., before they became bankrupts, were not lawfully possessed of the said bills of sale in the said declaration mentioned, or either of them, as of their own proper bills or bill of sale, in manner and form as the plaintiffs have above complained against him. And of this the defendant puts himself upon the country, &c.

Plea, that bankrupts were not possessed of, &c. as of their own, &c.

And for a further plea in this behalf, the defendant says, that the plaintiffs, after the said &c. became bankrupts, were not lawfully possessed of the said bills of sale or either of them as in the said declaration is alleged. And of this the defendant puts himself upon the country, &c.

Plea, traversing the possession of the *plaintiff as assignee.*

(*e*) *Gledstone* v. *Hewett*, 1 Tyrw. 446.

(*f*) Where a defendant in trover pleaded that a judgment was recovered against J. F., and that the defendant (a sheriff's officer) seized the goods under an execution against J. F., *the same being the goods and chattels of the said J. F. and liable to be seized and taken as aforesaid, and not being the property of the said plaintiff*, and the plaintiff replied that they were the property of the said plaintiff, *modo et formâ*; and at the trial it was found by the jury that they were the property of the plaintiff and J. F. jointly; it was held that the issue raised by the defendant was whether the cattle were the sole property of J. F. and the jury having found that they were the joint property of the plaintiff and J. F., that the plaintiff was entitled to recover; *Farrar* v. *Beswick*, 1 M. &. W. 682.

By Assignees of a Bankrupt.

Plea to an action of detinue by assignees, that deeds in declaration mentioned were deposited by bankrupt in defendant's hands, as security for a debt.

And for a further plea in this behalf, the defendant says, that heretofore and before the said E. F. became bankrupt, to wit, on &c. a certain large sum of money, to wit, the sum of £——, was then due and owing from the said E. F. to the defendant, and the said sum of money being so due and owing, it was then agreed by and between the said E. F. and the defendant, that in consideration thereof and of the forbearance of the said sum of money as hereinafter mentioned, the said E. F. would deposit with the defendant the said deeds and securities in the said declaration mentioned, as a security for the repayment of the said sum of £—— by the said E. F. to the defendant, and that the defendant should hold and detain the said deeds and securities till the said sum of £—— should be so repaid; and the defendant further saith, that afterwards, to wit, on &c. last aforesaid, the said E. F. in pursuance of such agreement, did deposit with the defendant the said deeds and securities for the purpose aforesaid; and the defendant further saith, that the said sum of £—— hath not at any time been repaid to the defendant, but the same hath from thenceforth hitherto been forborne by the defendant, and the same is still wholly due, in arrear and unpaid to him the defendant, for which reason he the defendant hath from thence hitherto detained, and still detains, the said deeds and securities, as he lawfully may for the cause aforesaid. And this the defendant is ready to verify, &c.

Plea, that the bankrupts assigned over their interest in the ship, and that in the execution of the deed of assignment, the bankrupts delivered to defendant the bills of sale as a collateral security.

And for a further plea in this behalf, the defendant says, that the said &c. before they became bankrupts, to wit, on &c. *were lawfully possessed of and entitled unto one moiety, half part, or share of the said ship called the* ——, *in the said first count of the said declaration mentioned, as of their own proper goods and chattels, and being so possessed and entitled,* by a certain indenture then made between &c. before they became bankrupts, of the one part, and the said &c., the elder &c., the younger, and &c. of the other part, (one part of which said indenture, sealed with the seal of the said &c., and &c. the younger, and &c. the defendant now brings here into Court, bearing date the same day and year last aforesaid), *they the said &c. for a certain good and valuable consideration therein mentioned,* in due form of law granted, bargained, sold, assigned, transferred and set over unto the said &c. the elder, &c. the younger, &c. all their said half-part or share, right, title and interest of, in and to the said ship called the ——, to hold the same to them the said &c. the elder, &c. the younger, and &c. as their own proper goods and chattels, and to their own proper use for ever as by the said indenture more fully appears; and the said &c. *upon the execution of the said indenture,* and before they became bankrupts, to wit, on the same day and year last aforesaid, delivered the said *bills of sale* in the said declaration mentioned, *being bills of sale of the said ship or vessel called the* ——, unto the defendant, to be kept by him as the evidence of his title to the said moiety or *half* part or share of the said ship; wherefore the defendant detained and still doth detain the same bills of sale as he lawfully may for the cause aforesaid. And this the defendant is ready to verify, &c.

XI. PLEAS IN BAR IN CASE.

See the Pleading Rules in Case, Reg. Gen. Hil. T. 4 W. 4, reg. iv. *ante*, vol. i. 518 ; and Appendix, vol. i. 754.

1. In General.

In General.

In the Q. B. [*or* "C. P." *or* "Exchequer of Pleas."]

The —— day of ——, A. D. ——.

General issue in case by one defendant. (a)

D. ats. B. } The defendant, by E. F. his attorney, says, that he is not guilty of the said alleged grievances above laid to his charge, or of any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant puts himself upon the country, &c.

The like by several defendants.

In the Q. B. [*or* "C. P." *or* "Exchequer of Pleas."]

The —— day of ——, A. D. ——.

D. and others ats. B. } The defendants, by ——, their attorney, say, that they are not nor were nor was nor is either of them, guilty of the said alleged grievances above laid to their charge, or any or either or any part thereof, in manner and form as the plaintiff hath above

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(a) See form 1 Rich. C. P. 148 ; Morg. 314. As to what may be given in evidence under this plea, see *ante*, vol. i. 518. A plea of *not guilty* puts in issue as well the injury alleged to have been committed by a dog, as also the defendant's *scienter* of his bad propensity, *Thomas* v. *Morgan*, 2 Crom. M. & Ros. 496 ; 4 Dowl. 223 ; but not an allegation of plaintiff's possession of building or land to which an easement or right of common or way is stated to have belonged ; *Frankum* v. *Earl Falmouth*, 1 Harr. & Wol. 1 ; 4 Nev. & Man. 330 ; 6 Car. & P. 529, S. C. In an action on the case for maliciously suing out a fiat in bankruptcy, the usual allegation in the declaration as to the annulling of the fiat is not put in issue by the plea of not guilty, *Atkinson* v. *Raleigh*, 2 G. & D. 611 ; and in an action against the sheriff for removing goods seized under a *fi. fa.* without paying a year's rent in arrear, the plea of not guilty admits the seizure by the sheriff, and it is not necessary to produce the warrant in order to connect him with the officer ; *Reid* v. *Poynts*, 8 Dowl. 410 ; see same case, 6. M. & W. 410, by the name of *Reid* v. *Thoyts*. A plea to an action against the sheriff for not selling goods of W. seized by him, that the defendant could not, nor might, nor ought to have sold the said goods, or any of them, under the said writ, or to have raised thereout the monies indorsed to be levied within the time in the declaration mentioned, is bad, as amounting to the general issue ; *Rowe* v. *Ames*, 6 M. & W. 747 ; 8 Dowl. 750, S. C. The 6 & 7 Vict. c. 96, s. 1, enacts, "That, in any action for defamation, it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action,) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology." See plea under section 2 of this act, *post*, 256. If *non assumpsit* be pleaded to a count in trover, the judge will not try, but discharge the jury, and not permit an amendment, unless by consent ; *Bent* v. *Benyon*, 6 C. & P. 217. As to pleading the general issue by statute, see rule T. T. 1 Vict. ; see also *Bartholomew* v. *Carter*, 3 M. & G. 125. The plea is in form the same as above, except that the words "by statute" are required to be inserted in the margin of the plea.

IN GENERAL. thereof complained against them. And of this they put themselves upon the country, &c.

Plea of general issue by solicitor of customs, on behalf of the queen, under 9 Geo. 4, c. 25. (b)

And the defendant, who has been duly appointed solicitor on behalf of her Majesty under the directions of the Commissioners of her Majesty's Customs, and who acts as such solicitor under such directions in this behalf, says, that he is not guilty of the said supposed grievances or any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof complained. And of this the defendant puts himself upon the country, &c.

Plea, confessing causes of action in certain counts and certain damages thereby sustained, and general issue to the residue. (c)

And the defendant, by —— his attorney, as to the [first and second] counts of the said declaration, confesses the said action of the plaintiff as to the said supposed grivances in those counts mentioned, and that he the plaintiff, by means of the committing of the said grievances in those counts of the said declaration mentioned, hath sustained damage to the amount of £—— over and above his costs and charges by him about his suit in that behalf expended, and which said sum of £—— he the defendant hath always been ready and willing and still is ready and willing to pay to the plaintiff. And the defendant, as to the [third and last counts] of the said declaration, says, that he is not guilty of the said grievances in those counts mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff hath above complained against him. And of this he puts himself upon the country, &c.

Statute of Limitations. (d)

And for a further plea in this behalf, the defendant says, that the said several causes of action in the said declaration mentioned did not, nor did any or either of them, accrue at any time within six years next before the commencement of this suit, in manner and form as the plaintiff hath above thereof complained against him the defendant. And this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof.

Accord and satisfaction. (e)

And for a further plea in this behalf, the defendant says, that after the committing of the said grievances as aforesaid, and before the commencement of this suit, to wit, on &c. he the defendant paid to the plaintiff the sum of £—— for and in full satisfaction and discharge of the said grievances

(b) See 6 Bing. 404; see last note, and *ante*, 31.

(c) See 1 Saund. 200, n. (f); and see the use of this plea, *ante*, 32, note; for replication, see *post*.

(d) As to this plea, see 6 East, 387; 3 B. & Ald. 448. It seems, that to an action of trover, or on the case for a grievance, the committing of which *immediately* gives a right of action, the plea of not guilty within six years is good, though it may be better to adhere to the above form in all cases, being more consonant to the act of parliament. In *Pratt* v. *Swaine*, 24th May, 1828, 8 B. & C. 285, S. C., Bayley, Holroyd, and Littledale, Justices, stated, that they considered that the plea of not guilty within six years would be sufficient in the ordinary action of trover. But as the plaintiff declared as administrator, and alleged the conversion after the death, and did not show that the conversion was before letters of administration were obtained, the Court held, that, according to 5 B. & Ald. 204, the plea of not guilty within six years was bad; for *non constat* that the conversion was before the letters of administration were obtained, in which case the six years would not begin to run till they had been obtained.

(e) See form, 5 East, 294. The subject-matter of this plea might formerly be given in evidence under the general issue in case, but not in trespass, 3 Burr. 1353; 1 Bla. Rep. 388, S. C.; but now it must always be pleaded. If the accord and satisfaction took place after action brought, the plea should be pleaded in bar of the *further* maintenance of the action; see form in assumpsit, *ante*.

in the said declaration mentioned, and of all damages thereby sustained, and which said sum of £—— the plaintiff then accepted and received of and from the defendant in full satisfaction and discharge of the said grievances and damages. And this the defendant is ready to verify, &c.

To action for negligence of defendant's workmen in breaking the plaintiff's windows, plea, that the defendants replaced them with new panes, and which replacing, the plaintiff received in satisfaction. (*f*)

And for a further plea in this behalf, as to breaking the said panes of glass in the declaration mentioned, the defendant says, that he the defendant, shortly after the said panes of glass were so broken as in the declaration mentioned, and before the commencement of this suit, to wit, on the —— day of ——, A.D. ——, caused and procured the said panes of glass so broken as aforesaid to be replaced with new panes of glass at their costs and charges, in full satisfaction and discharge of the damages sustained by the plaintiff by reason of the breaking thereof; and which replacing of the said panes of glass, the plaintiff then agreed to accept and receive and then accepted and received in full satisfaction and discharge of the damages in the introductory part of this plea mentioned and of all causes of action in respect thereof. And this the defendant is ready to verify, &c.

2. For Libel and Slander. (*g*)

For Libel and Slander.

Denial that plaintiff was an attorney, as alleged in a declaration for slander.

And for a further plea in this behalf, the defendant says, that the plaintiff was not at any or either of the times in the said declaration mentioned nor is an attorney of the said Court of ——, in manner and form as the plaintiff hath in his declaration alleged. And of this the defendant puts himself upon the country, &c.

To a declaration alleging that at the time of the publishing the libel thereafter mentioned, the defendant used the words in a certain sense, plea to part of the libel that the defendant did not use the words in the sense stated. (*h*)

And for a further plea in this behalf, as to the publishing, and causing and procuring to be published, the following part of the said supposed libel (*i*), that is to say, ["black sheep,"] the defendant says, that before or at the time of committing of the said supposed grievance, he the said defendant did not use the said word ["black sheep"] for the purpose of expressing or meaning, nor was the same word, when used by him, by the said persons in the declaration mentioned, or any of them, understood as expressing or meaning [a person notorious by reason of bad character, and of stained and sullied repu-

(*f*) See *Bradbee* v. *Christ's Hospital*, 4 M. & G. 723.

(*g*) As to pleas to declarations for *libels* or *verbal* slander, see in general, *ante*, vol. i. 519 to 526.

(*h*) Where the plaintiff, by way of inducement, avers that certain words have acquired or were used in a sense different from their natural one, (and which he could not do by an innuendo, *Angle* v. *Alexander*, 7 Bing. 123), the defendant may plead as in this form to the *publication* of the libel or that part of it to which the inducement relates, instead of to the inducement itself, and it is necessary to traverse the allegation specially; *M'Gregor* v. *Gregory*, 11 M. & W. 287.

(*i*) Where the libellous matter is divisible, the defendant may plead to *part* of the libel; *Clarkson* v. *Lawson*, 6 Bing. 587; *Mountenay* v. *Watton*, 2 B. & Ad. 673; *M'Gregor* v. *Gregory*, 11 M. & W. 287; and see *Clarke* v. *Taylor*, 2 Bing. N. C. 664. But in an action on the case for a conspiracy, a plea which justifies an overt act, without justifying the conspiracy, is bad; *Gregory* v. *The Duke of Brunswick*, 1 D. & L. 518. And where the plaintiff declared on a libel alleging that the plaintiff had been in prison, and had applied for money to pay his quarter's rent, that he was insolvent and in bad circumstances, and was a "mere man of straw," (thereby meaning that he was insolvent, and in bad circumstances), on general demurrer to the allegation that the plaintiff was a "mere man of straw," it was held that it was not necessary to explain the meaning of that term by a prefatory averment, and that as the libellous matter contained but one charge, viz. insolvency, the defendant could not plead or demur to part only; *Eaton* v. *Johns*, 1 Dowl. N. S. 602.

FOR LIBEL AND SLANDER.

tation], in manner and form as in the declaration alleged. And of this the defendant puts himself upon the country, &c.

Justification of words of theft, that plaintiff was guilty of theft. (*k*)

And for a further plea in this behalf, [*if the plea is intended to justify the words in particular counts only, here say,* " as to the speaking and publishing of the said several words of and concerning the plaintiff, as in the said —— counts mentioned,"] (*l*) the defendant saith, that the plaintiff, before the speaking and publishing of the said several words of and concerning the plaintiff, as in the said [—— counts of the said] declaration mentioned, to wit, on &c. did feloniously steal, take and carry away certain goods and chattels, to wit, —— of one E. F. (*m*) of great value, to wit, of the value

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(*k*) See the forms and notes, 1 Saund. 244, n. 6; 8 Wentw. Index, xii. to xv.; 2 Rich. C. P. 62, 153; Morg. 313 to 320; Plead. A. 112; Herne, 112.

The necessity for pleading specially in slander, and the mode of framing such pleas, will be found more fully considered in volume i. of this work. Where the defendant justifies the slander, it will in general be found necessary to plead specially. General pleading is not allowed in justifying the truth of the slander, and the plea must point out the facts specifically, though indeed where the charge contained in the slander is specific, the defendant need not further particularize it in his plea, see fully vol. i. Index, "*Slander.*" Care should be taken that the plea of justification do not, in its commencement or elsewhere, profess to justify any part of the slander which cannot be justified. When the libel comprises allegations of facts, and a comment thereon, and the comment involved an imputation which may or may not be a just inference from the facts, it may then be a distinct libel, rendering it advisable for the defendant to justify the comment as well as the allegations of fact in this plea; *Cooper* v. *Lawson*, 8 A. & E. 746; 1 G. & D. 15, S. C.

It was formerly usual in the plea to repeat the words mentioned in the declaration, but this is no longer the practice, 1 Saund. 244, n. 6, unless the defendant only justifies speaking *part* of the words in any particular count, in which case the plea may run thus:—"And for a further plea in this behalf, as to the speaking and publishing of the following words in the said —— counts mentioned, that is to say, he, &c. (*repeating the words intended to be justified, with the innuendoes*) the defendant saith, &c."

How to plead where all the counts are on the same libel, see 2 Chit. Rep. 291. From that case it appears, a plea, stating that the libels were one and the same libel, and also justifying it, would be bad on demurrer, for duplicity.

The plaintiff, on the trial, cannot object to the insufficiency of the plea, justifying a libel; 3 Stark. 7.

Where in an action by an apothecary for slander for the words "He killed my child, it was the saline injection that did it," innuendo, that the defendant meant that the plaintiff had been guilty of feloniously killing the child; the defendant pleaded a justification that the plaintiff did injudiciously, indiscreetly and improperly, and contrary to his duty in that behalf, administer a certain saline injection to the said child, and that the death of the said child was then caused or occasioned or greatly accelerated by the aforesaid saline injection; it was held upon demurrer, that the plea was bad, for that it confessed the meaning imputed to the words spoken, that the plaintiff had been guilty of manslaughter, and afforded no justification for such an allegation. Another count of the same declaration alleged the use of the words, "Mr. P. told me that he had given my child too much mercury, and poisoned it, otherwise it would have got well," innuendo, that the plaintiff had, through ignorance or inattention, administered to the said child such an excessive quantity of mercury that the said mercury had acted as poison and caused the death of the child; and the defendant pleaded that the plaintiff did wrongfully and improperly, and contrary to his duty, administer to the said child of the defendant an excessive proportion of mercury, having reference to the state and condition of the child; it was held that the plea neither confessed nor avoided the charge in the declaration, and was therefore bad; *Edsall* v. *Russell*, 2 Dowl. N. S. 641.

(*l*) The plea should be pleaded to those words only which the defendant can justify, 6 Bing. 266; 2 B. & Adol. 673.

(*m*) Where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff, and where to a declaration for words imputing to the plaintiff, a pawnbroker, that he had committed the unfair and dishonourable practice of duffing, that is to say, of replenishing or doing up goods, being in his hands in a damaged or worn out condition, and pledging them with other pawnbrokers, the defendant pleaded that the plaintiff did replenish and do up divers goods, being in his hands in a damaged or worn out condition, and pledge them with divers other pawnbrokers; the plea was held bad on special demurrer as not being sufficiently specific; *Hickinbotham* v. *Leach*, 10 M. & W. 361; 2 Dowl. N. S. 270, S. C.

of £—— (*n*), wherefore he the defendant afterwards, to wit, at the said several times when &c. in the [said —— counts mentioned,] did speak and publish the said words of and concerning the plaintiff as in those counts mentioned, as he lawfully might for the cause aforesaid. And this the defendant is ready to verify, &c.

Justification of words of perjury, that plaintiff was guilty of perjury. (*o*)

And for a further plea in this behalf, the defendant says, that before the speaking and publishing the said words of and concerning the plaintiff, [in the said —— counts mentioned,] to wit, on &c. at the assizes in and for the county of ——, (*p*) then holden at —— in the said county, before ——, then chief justice of our said lady the queen, assigned to hold pleas before the queen herself, and ——, then one of the justices of our said lady the queen, assigned to hold pleas before the queen herself, justices of our said lady the queen, appointed to take the assizes for the said county according to the form of the statute in such case made and provided, a certain issue before then joined in an action brought and prosecuted in the Court of our said lady the queen, before ——, and his companions, then justices of our said lady the queen of the Bench at Westminster, in the county of Middlesex, by and at the suit of one E. F. as the plaintiff, against one G. H. as the defendant, for the supposed breach of certain promises alleged by the said E. F. to have been made to him by the said G. H. and not performed, came on to be tried in due form of law, and was then tried by a jury of the country in that behalf, duly taken and sworn between the parties aforesaid, and upon such trial of the said issue the plaintiff appeared as a witness for and on behalf of the said E. F. the plaintiff in the said action, and the plaintiff was then in open Court at the said assizes holden as aforesaid, before the said —— and ——, (*q*) the justices aforesaid, duly sworn, and took his corporal oath upon the Holy Gospel of God, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue [they the said —— and —— then having sufficient and competent power and authority to administer the said oath to the plaintiff in that behalf]; and upon the said trial of the said issue, it then became and was material to ascertain the truth of the matters hereafter stated to have been sworn to by the plaintiff. And the defendant further says, that the plaintiff being so sworn as aforesaid, upon his oath aforesaid, then, to wit, on &c. aforesaid, falsely, wickedly, wilfully, maliciously and corruptly, and by his own act and consent did say, depose, swear and give evidence, amongst other things, at and upon the said trial, to and before the said jurors so sworn to try the said issue as aforesaid, and the justices aforesaid, that, &c.—[*Here state that part of the plaintiff's evidence in which he committed perjury.*]—Whereas in truth and in fact, &c.—[*Here negative the plaintiff's evidence, as in an indictment for perjury.*]—And the plaintiff did thereby in the said Court at the said assizes so holden as aforesaid, upon his said oath

(*n*) If the offence were not one at common law, but only by statute, then frame the plea accordingly, and state that the theft was "against the form of the statute in such case made and provided."

(*o*) See forms, 2 Rich. C. P. 153; Ast. Ent. 21; Thomp. Ent. 65; 3 Inst. Cl. 234, 237; 6 Wentw. Index, xii. to xv.; 1 Taunt. 543, and the note to the former precedent, and Com. Dig. Pleader, 2 L. 3, &c.

(*p*) Of course the plea must agree with the facts, the form here given is merely an outline.

(*q*) It is sufficient to say, before the judge who tried the cause; 1 Leach, 150; 2 Chit. Crim. Law, 309, 367.

For Libel and Slander.

upon the trial of the said issue, then falsely, wickedly, wilfully and corruptly, commit wilful and corrupt perjury; wherefore the defendant, at the said several times, when &c. in the said —— counts mentioned, spoke and published of and concerning the plaintiff the said several words in the said —— counts mentioned to have been spoken and published by the defendant of and concerning the plaintiff, as it was lawful for him to do for the cause aforesaid. And this the defendant is ready to verify, &c.

Plea to declaration for words that plaintiff broke into defendant's cellar and got drunk. (r)

And for a further plea in this behalf, as to the [first, second and last counts, and as to the speaking and publishing of the following words, that is to say, "I am sure that he (meaning the plaintiff) did," (meaning that the plaintiff had broken into his the defendant's cellar) as in the said fourth count] of the declaration mentioned, the defendant says, that before the committing of the grievances, to wit, on the —— day of —— A. D. 1835, the plaintiff broke open the door of a cellar of the defendant in a house of the defendant, and then broke into the said cellar of the defendant and got drunk, and spoiled the said work, in the introductory part of the said declaration mentioned, therefore the defendant did commit the supposed grievances in the introductory part of that plea mentioned, as he lawfully might for the cause aforesaid. And this the defendant is ready to verify, &c.

Justification of words of insolvency, that plaintiff was insolvent. (s)

And for a further plea in this behalf [to the —— counts of the declaration], the defendant says, that the plaintiff, at the said several times when &c. [in the said —— counts mentioned] was in bad and indigent circumstances, and incapable of paying his just debts, (t) to wit, a certain just debt, amounting to a large sum of money, to wit, the sum of £——, which he then owed to one E. F. for &c. [*here state generally the subject-matter of the debt*] and a certain other just debt, amounting to a large sum of money, to wit, the sum of £——, which he the plaintiff then owed to one G. H. for &c. [*enumerating as many debts as can be proved to have been long in arrear,*] and which said several debts the plaintiff was then unable to pay. And this the defendant is ready to verify, &c.

Plea of confidential communication, viz. that a third person applied to defendant to inquire respecting plaintiff's solvency, and that defendant spoke the words believing them to be true, held that the plea must also add, "*and without malice;*" *Smith* v. *Thomas*, 4 Dowl. 333.

See the form in *Smith* v. *Thomas*, 4 Dowl. 333; 2 Bing. N. C. 372.

Plea justifying the *truth* of part of the libel set forth in declaration, charging plaintiff, a proctor, with having been suspended three times. (u)

And for a further plea in this behalf, as to the publishing, and causing and procuring to be published, so much of the said supposed libellous matter as

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(r) See form, 1 Crom. M. & Ros. 184.

(s) See the notes, *ante*, 250; Com. Dig. Pleader, 2 L. 3.

(t) This must correspond with the words stated in the declaration.

(u) This was the form adopted in 6 Bing. Rep. 587. In that case the declaration was for a libel on plaintiff, a proctor, charging him with having been suspended three times, and the plea as above justified the truth as to one of the said suspensions, that the plaintiff had been once suspended by Sir J. N.; it was held that the libellous matter was thus divisible, and the plea was an answer to part; see *Mountney* v. *Watton*, 2 Bar. & Adol. 673, and *Atkinson* v. *Warne*, 6 Car. & P. 687; *Goodburne* v. *Bowman*, 9 Bing. 532; 2 Moore & Scott, 700, S. C. In support of a justification of a libel imputing forgery or felony, the evidence should be the same as would be sufficient to adduce in support of an indictment for the offence; but still, if the evidence fall short of proving a strict legal offence, the jury may take the facts proved into their consideration, on estimating the damages; *Chalmers* v. *Shackle and others*, 6 Car. & P. 476.

imputes or charges to or against the plaintiff, that he, before the said several times when &c. had been once suspended in his aforesaid profession and business of a proctor, above supposed to have been done by the defendant, the defendant says, that the plaintiff, before the said times when &c. in the said declaration mentioned, to wit, on the 10th of January, in the year last aforesaid, had been employed in the way of his aforesaid profession and business as a proctor by one T. G., and afterwards, and before the said several times when &c. to wit, on the day and year last aforesaid, fraudulently and extortionately demanded of and from the said T. G. as and for the sum of money justly due to him the plaintiff from the said T. G. for the work and labour of him the plaintiff as such proctor done, performed and bestowed in and about the business of the said T. G. in pursuance of the last aforesaid employment, and for the fees and disbursements due and made to and by him as such proctor in respect thereof, a certain large sum of money, to wit, the sum of £19 : 14*s.* : 4*d.* (*x*) whereas in truth and in fact, the sum of money then justly due to him the plaintiff in that behalf then amounted to a much less sum of money, to wit, the sum of £9 : 19*s.* : 8*d.* And the defendant further saith, that afterwards, and before the said several times when &c. to wit, on the 13th day of February, in the year last aforesaid, Sir J. N. knight, then being Judge of the Prerogative Court of Canterbury, caused the aforesaid false, fraudulent and extortionate demand to be taxed by the proper officers of the said Court in that behalf, to wit, the Rev. G. M., C. M., Esq. and the Rev. R. M. registrars of the said Court; and that the said officers, by their deputy in that behalf, did afterwards and before the said several times when &c. to wit, on the 20th day of February in the year last aforesaid, report in the said Court to the said Sir J. N. as and being such Judge as aforesaid, according to the forms and practice of the said Court, that upon such taxation of the aforesaid false, fraudulent and extortionate demand, a small part thereof, to wit, the sum of £9 : 19*s.* : 8*d.* only, had been justly found due to the plaintiff from the said T. G. And the defendant further saith, that thereupon by reason of the premises, afterwards and before the said several times when &c. to wit, on the 19th day of March, in the year aforesaid, the said Sir J. N. as and being Judge of the said Court, did order, direct and adjudge to be suspended, and did suspend, the plaintiff from exercising the business of a proctor of the said Court for and during the space of one year then next following; and did then direct that at the expiration of the space of one year the plaintiff should be further suspended until he should appear and publicly make faithful promise to abstain from all mal-practices in the future exercise of his business as a proctor in the said Court. And the defendant further saith, that the said Sir J. N. in that plea mentioned, and Sir J. N. in the said supposed libels named, are one and the same person; wherefore the defendant afterwards, at the said several times when &c. did publish, and cause and procure to be published, so much of the said supposed libellous matters in the said declaration mentioned as imputes or charges to or against the plaintiff, that he the plaintiff, before the said several times when &c. had been once suspended

(*x*) *Semble*, that in a plea of justification, several criminal acts of the plaintiff may be stated, and it will suffice to prove a part of them; see 6 Bing. 587; *Mountney* v. *Watton*, 2 Bar. & Adol. 673; *Atkinson* v. *Warne*, 6 Car. & P. 687; 3 Dowl. 483.

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in his aforesaid profession and business of a proctor, and as he the defendant lawfully might for the cause last aforesaid, which are the same publishing and causing to be published the said supposed libellous matters as are in the introductory part of this plea mentioned. And this the defendant is ready to verify, &c.

That defendant had reasonable cause to suspect that plaintiff had been guilty of opening letters, and that as an attorney defendant had been employed to prosecute him on a penal statute, and that the letters written and the words spoken were written and spoken by persons employed in superior stations in the post office to defendant, by way of complaint.(y)

And for a further plea in this behalf, as to the composing and publishing the said supposed libel in the said [first] count of the said declaration mentioned, and also as to the speaking and publishing so many of the supposed words in the [last] counts of the said declaration mentioned as impute to the plaintiff the unlawful opening of letters received by him, as such deputy post-master as aforesaid, before the delivery thereof to the persons to whom the same were directed, or for their uses, the defendant says, that before the composing and publishing of the said supposed libel, and also before the speaking and publishing of the said supposed words in the introductory part of this plea mentioned, and whilst the plaintiff was such deputy post-master, as in the said declaration mentioned, to wit, on &c., as well a certain letter directed to one G. A. (by the name and description of Mr. A. B.) as certain other letters had been severally delivered into the post-office there; and that after such delivery of the said letters respectively into the said post-office, and before they were delivered to the said persons to whom the same were directed, or to their use respectively, and also before the composing and publishing of such supposed libel, or the speaking and publishing of such words as aforesaid, to wit, on &c. last aforesaid, the said letters had been unlawfully opened, contrary to the form of the statute in such case made and provided; and the defendant further says, that he, before and at the said times when &c., in the said first and last counts mentioned, to wit, on the day and year therein specified, had reasonable and probable cause to suspect (z) and did then actually suspect that the plaintiff, whilst such deputy post-master as aforesaid, had unlawfully opened the said letters, and had been in the habit of opening letters delivered into the said post-office, as in those counts mentioned, and that the said supposed libel was directed and sent by the defendant to the said B. I. B. in the said declaration mentioned, and the said words were spoken and published by the defendant to persons who, as well as the said B. I. B. at the said times when &c. in the said first and last counts mentioned, were severally employed in and relating to the post-office in stations superior to that of the plaintiff as such deputy post-master, and were respectively published to them by way of complaint against the plaintiff, the said B. I. B. and the said other persons then being

(y) On the subject of pleas of justification of libels on the ground of privilege, allusion may be made to the well known case of *Stockdale* v. *Hansard and others*, which excited so much public attention at the time. The libel was contained in a Report of the Inspectors of Prisons, and the defendants, the printers to the House of Commons, pleaded a justification under resolutions and orders of the House in Parliament assembled. To this plea the plaintiff demurred, setting out for causes, "that the known and established laws of the land could not be superseded, suspended or altered by any resolution of the House of Commons, and that the House of Commons or Parliament assembled could not, by any resolution or order of themselves, create any new privilege to themselves inconsistent with the known laws of the land; and that, if such power were assumed by them, there could be no reasonable security for the life, liberty, property or character of the subjects of this realm." And, after a lengthened argument, the Court of Queen's Bench gave judgment for the plaintiff. See the arguments and judgment at length, 2 P. & D. 1.

(z) The ground of suspicion must be shown; 4 Taunt. 30.

parties to whom the complaint, on the occasion aforesaid, might be fitly and properly made; and the defendant further says, that before the time of the composing and publishing of the said supposed libel, to wit, on &c. he the defendant, being such attorney as aforesaid, had commenced an action at the suit of one T. D. against the plaintiff in her majesty's Court, before the queen herself, then and still being holden at Westminster aforesaid, upon a statute made and passed in the ninth year of the reign of Queen Anne, for the recovery of several penalties which were alleged to have been incurred by the plaintiff by reason of his opening and causing and procuring and permitting and suffering to be opened the aforesaid letters directed to the said G. A., contrary to the form of the same statute, which are the same composing and publishing of the said supposed libel and the speaking and publishing of the said words in the introductory part of this plea mentioned, and whereof the plaintiff hath in and by his said first and third counts in that behalf complained against him the defendant. And this the defendant is ready to verify, &c.

Plea to an action for a libel that defendant as commanding officer sent the letter to the commander-in-chief, in order that plaiutiff might be brought to a court martial. (a)

And for a further plea in this behalf, the defendant says, that before and at the time of the said supposed grievances, the defendant was colonel and commanding officer of the said regiment in the said declaration mentioned, called &c., and being such colonel and commanding officer of the plaintiff, the plaintiff being, as averred in the said declaration, captain [lieutenant] and paymaster of the said regiment, the said several charges stated and alluded to in the said declaration, as contained in the said supposed libel in the said declaration mentioned, were charges and accusations made and exhibited to him the defendant, as such commanding officer of the said regiment as aforesaid, by the lieutenant and acting adjutant in the said regiment, E. F. in the said declaration also mentioned, officially, and in order that he the defendant might also officially, and as in duty bound, as such colonel and commanding officer of the said regiment, transfer the said charges to the then commander-in-chief, the Honourable General G. H., and which said charges he the defendant did then accordingly transfer to the said commander-in-chief, in order that the plaintiff might be brought to a court martial for the said alleged offences in the said charges contained, as it was lawful for the defendant to do for the cause aforesaid, which is the same publishing of the said libel in the said declaration mentioned. And this the defendant is ready to verify, &c.

Plea to declaration for slander of plaintiff's ship, that defendant had seen the ship, and the splice or scaff was open, so that he could put in his fingers.

And for a further plea in this behalf, as to the speaking and publishing the words following, parcel of the words in the said first count of the said declaration mentioned, to wit, "I saw the ship, and the splice or scaff of the keelson was open, so that I could put my four fingers in edgeways;" and also as to the speaking the words in the said second count of the said declaration mentioned, to wit, "the ship's back is broke," and also as to speaking and publishing the said words in the third count of the said declaration mentioned, he the defendant says, that before the time when the said words were by him spoken as aforesaid, he the defendant had seen the

(a) This plea is sustainable; see *Johnson* v. *Sutton*, 1 T. R. 493; but see 4 Taunt. 67; 6 Esp. Rep. 63.

For Libel and Slander.

said ship, and the splice or scaff of the keelson of the said ship was open, so that he the defendant could put his four fingers in edgeways, and that the said ship's back was broke, by reason thereof the defendant, at the time in the said declaration mentioned, spoke and published the said words in the introductory part of this plea mentioned, as it was lawful for him to do. And this the defendant is ready to verify, &c.

To an action against the proprietor of a newspaper or other periodical for libel, plea, under 6 & 7 Vict. c. 96, s. 2, that it was inserted without malice and gross neglect, and defendant inserted apology, and payment into Court as amends. (*b*)

And the defendant, by —— ——, his attorney, says, that the plaintiff ought not further to maintain his said action, because the defendant says that the libel in the declaration mentioned was contained in a certain public newspaper [*or* "periodical publication"], to wit, in the —— ——, and the said libel was inserted in the said newspaper [*or* "periodical publication"] without actual malice, and without gross negligence; and the defendant further says, that after the said publication thereof and before the commencement of this action, [*or* "at the earliest opportunity after the commencement of this action,"] to wit, on the —— day of ——, A. D. ——, he the defendant inserted in the said newspaper [*or* "periodical publication] a full apology for the said libel [*or if the newspaper &c. in which the libel appeared should be ordinarily published at intervals exceeding one week say*, "offered to publish a full apology for the said libel in any newspaper or periodical publication to be selected by the plaintiff"]; and the defendant now brings into Court here the sum of £—— ready to be paid to the plaintiff, by way of amends for the injury sustained by the publication of the said libel. And the defendant further says, that the plaintiff has not sustained damages to a greater amount than the said sum of £—— in respect of the causes of action in the declaration mentioned. And this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought further to maintain his action.

4. By Carriers.

By Carriers.

Denial of receipt of goods by a carrier. (*c*)

And for a further plea in this behalf, the defendant says, that the plaintiff did not cause to be delivered to him the defendant, nor did the defendant

(*b*) The 6 & 7 Vict. c. 96, s. 2, enacts, "That in an action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper, or other periodical publication, without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper, or other periodical publication, a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, has offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall, upon filing such plea, be at liberty to pay into Court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into Court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into Court, under an act passed in the session of parliament held in the fourth year of his late majesty, intituled, 'An Act for the further Amendment of the Law, and the better advancement of Justice,' and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea." The first section of this act enables the defendant, (after notice in writing of his intention so to do duly given to the plaintiff at the time of filing or delivering the plea), in all actions for defamation, to give in evidence an apology, or an offer of an apology, *in mitigation of damages*; see *ante*, vol. i. p. 522.

(*c*) See *Wylde* v. *Pickford*, 8 M. & W.

accept or receive of or from the plaintiff the said goods and chattels in the declaration mentioned, or any of them, or any part thereof, to be carried and conveyed by the defendant in manner and form as the plaintiff has in the said declaration thereof alleged. And of this the defendant puts himself upon the country, &c.

By a carrier, that goods were not lost by his neglect. (*d*)

And for a further plea in this behalf, the defendant says, that the said [box] and its contents were not lost by the carelessness, negligence or improper conduct of the defendant or his servant or servants in that behalf. And of this the defendant puts himself upon the country, &c.

Plea that it was agreed that the defendant should not be answerable for loss or damage. (*e*)

And for a further plea in this behalf, the defendant says, that the said goods and chattels in the declaration mentioned were delivered by the plaintiff to, and accepted and received by, the defendant, to be [ferried across the said ferry in the declaration mentioned, and there landed and delivered to the plaintiff], and the said reward in the declaration mentioned to the defendant in that behalf was for and in respect of such [ferryage and landing] and delivery, and for and in respect of nothing else. And the defendant further says, that at the time of the said delivery and acceptance and receipt of the said goods and chattels, that is to say, on the said —— day of ——, 18—, it was agreed by and between the plaintiff and the defendant, as part of the terms of the said acceptance and receipt, that he the defendant was not to be in anywise answerable or accountable to the plaintiff for any loss thereof or damage thereto which might occur in the course of the said [ferryage and landing] and delivery, and the defendant then accepted and received the said goods and chattels to be so [ferried and landed] and delivered as aforesaid, upon the terms of the said agreement, and upon no other terms whatsoever, whereof the plaintiff then had knowledge and notice. And the defendant further says, that the said loss and damage of the said goods and chattels in the declaration mentioned happened and took place without any personal negligence or want of care whatsoever by the defendant himself, and without any gross negligence or misfeasance of his [mariners] or servants, or otherwise howsoever. And this the defendant is ready to verify, &c.

Plea under 1 W. 4, c. 68, that the defendants caused to be duly published a notice of the increased rate of charge for the articles

And for a further plea in this behalf, the defendant says, that after the passing of a certain act of parliament made and passed in the session of parliament holden in the eleventh year of the reign of his late Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other common Carriers for

444. See also *Walker* v. *Jackson*, 10 M. & W. 161, where in an action against the owners of a ferry it was held, that a contract to carry and land a carriage and jewellery could not be implied from the mere character of the defendants as owners of the ferry.

It is not competent to the defendant, under the plea of not guilty, to set up as a defence, that the plaintiff misrepresented the weight of the goods which the defendant agreed to carry; the plea operating only as a denial of the loss or damage, and not of the receipt of the goods by the defendant, who ought either to plead the misrepresentation specially or traverse the acceptance of the goods for the purpose of being carried; *Webb* v. *Page*, 1 D. & L. 531.

(*d*) See forms in Petersdorff's Precedents, 134. *Quære*, whether this plea is not bad as amounting to the general issue.

(*e*) See *Walker* v. *Jackson*, 10 M. & W. 162.

By Carriers.

in the act and notice specified (including the goods the subject of the action); that the goods were above the value of £10, the nature of the article not declared, and that no payment was made or engagement to pay tendered. (*f*)

Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof," and before and at the time of the delivery to them of the said [two parcels] in the declaration mentioned, the defendants were common carriers of goods and chattels by land for hire, by a certain public conveyance, to wit, a van, from [London to Calne], as in the declaration mentioned, and the defendant had also, before and at the time of delivery of the said [two parcels], in pursuance of the said act, notified, published and stated, and caused to be notified, published and stated in and by a notice affixed in legible characters in a public and conspicuous part of the said office, where the said [two parcels] were delivered to them, as in the declaration mentioned, that is to say, in a public and conspicuous part of their the defendant's office at [Gerard's Hall, Basing Lane, in the City of London aforesaid], and at which said office parcels then were and still are received by the defendants for the purpose of conveyance by their said van, and in which said notice there was then and there, in such legible characters as aforesaid, notified, published, stated and set forth the increased rates of charge required by the defendants to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of the articles in the said act of parliament and notice specified and mentioned, and which said notice was and is as follows, that is to say, ["In pursuance of an act of parliament passed in the first year of the reign of his Majesty King William the Fourth, cap. 68, intituled, 'An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other common Carriers for hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof,' notice is hereby given, that for any package or passenger's luggage containing gold or silver coin, &c. [*enumerating the various other excepted articles in the first section of the act*], or any of them, to a greater amount in value than £10, the increased rates of charge over and above the common and ordinary rate of charge for carriage are as follows," [*state the increased charges, according to the notice.*] And the defendants further say, that the plaintiff, before and at the time of the delivery of the said [parcels] to the defendants as aforesaid, had notice of the premises; and the said increased rates of charges so required to be paid by the said notice as aforesaid, were due and reasonable and proper rates of charges in that behalf. And the defendants further say that at the time of the delivery to them of the said [two parcels] to be carried for hire by the said public conveyance as aforesaid, and continually from thence until the loss in the declaration mentioned, there were contained in the said parcels certain articles and property of the description in the said act of parliament and notice mentioned, that is to say, the said [silk] in the declaration mentioned, and no other article or pro-

(*f*) The 1 W. 4, c. 68, s. 1, protects a carrier from liability even for gross negligence in respect of the goods enumerated in the act above the value of £10, unless at the time of their delivery to the carrier their value and nature is declared, and an agreement entered into to pay the extra charge for them as provided by sect. 2; *Hinton* v. *Dibbin*, 2 Q. B. Rep. 646; 2 G. & D. 36, S. C. The statute must be specially pleaded; *Syms* v. *Chaplin*, 5 A. & E. 634; 1 N. & P. 129; 5 Dowl. 429, S. C.

perty whatsoever, and that the value of the said articles and property contained in each of the said parcels respectively then and during all the time aforesaid far exceeded the said sum of £10, and were of a certain value, to wit, £50 each parcel. And the defendants further say, that at the time of the delivery of the said parcels to the defendants at the said office as aforesaid for the purpose of being carried as aforesaid, the value or nature of the said articles and property so contained in the said parcels as aforesaid was not nor was it at any other time whatsoever declared by the plaintiff or by the person sending and delivering the same to the defendants, or to the person receiving the said parcels on their behalf, nor was the said increased charge so mentioned and contained in the said notice as aforesaid, or any engagement to pay the same then or at any other time whatsoever, offered or tendered to or accepted by the defendants or the person receiving the said parcels, or any other person or persons whatsoever on their behalf. And this the defendants are ready to verify, &c.

Similar plea of notice under a special contract. (g)

And for a further plea in this behalf to the [first] count of the declaration, the defendants say, that before and at the time of the delivery to the defendants by the plaintiff of the said [case] and its contents, as in the said [first] count mentioned, they the defendants were and still are common carriers of goods for hire, and that at the time of the delivery to them the defendants of the said [case] containing the said [maps], as in the said [first] count mentioned, they the defendants then gave notice to the plaintiff, and the plaintiff then had notice and knowledge, that the defendants would not be responsible for the loss of or damage done to certain goods and chattels delivered to them for the purpose of carriage or conveyance, and amongst others [maps in packages or otherwise], unless the same were insured according to their value, and paid for at the time of delivery to the defendants. And the defendants further say, that the said [case] was the package in which the said [maps] were contained, and that they accepted and received from the plaintiff the said [case] with the said [maps], the contents thereof as aforesaid, to be carried and conveyed as aforesaid, subject to and under and upon the terms and conditions of the said notice, and upon no other terms whatsoever; whereof the plaintiff, at the time of the delivery thereof by him to the defendants as aforesaid, had knowledge and notice. And the defendants further say, that the said [maps] were not, at the time of the delivery thereof to them the defendants as aforesaid, insured according to their value, or paid for. And this the defendants are ready to verify, &c.

(g) A carrier is not bound to convey goods except on payment of the full price for the carriage, according to their value; and if that be not paid, it is competent to him to limit his liability by special contract; and therefore where a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a special contract. But he is not exempted thereby from all responsibility, but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a misdelivery, arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care; *Wyld* v. *Pickford*, 8 M. & W. 443.

To an action for negligence and loss of silver, &c. shipped on board the defendant's ship, plea that the silver was stolen without the defendant's privity, and that neither the owners or shippers made any declaration in writing of the true nature, quality and value of the silver, according to the stat. 26 Geo. 3, c. 86. (*h*)

See *Gibbs* v. *Potter*, 10 M. & W. 70.

To action against the owner of a vessel for refusing to deliver residue of goods shipped on board the defendant's vessel for the consignee, who had assigned to the plaintiff, plea that the consignee was insolvent, and notice and stoppage in transitu by the consignors.

See *Jones* v. *Jones*, 8 M. & W. 431

By Innkeeper.

4. By Innkeeper.

Plea by an innkeeper to action for loss of goods, that defendant requested plaintiff to permit him to place the goods in safe place, but that plaintiff refused, and thereby occasioned the loss.

And for a further plea in this behalf, the defendant saith, that after the plaintiff was, as in the said declaration mentioned, received into the said inn, and had brought into the said inn the said carpet bag with the contents aforesaid, and before the same was taken and carried away and lost to the said plaintiff as in the said declaration is alleged, the defendant requested the plaintiff to allow and permit him the defendant to take care of the said carpet bag and the contents aforesaid, and remove the same into a safe and secure place in that behalf in the said inn, which the plaintiff wholly refused to allow or permit, and then claimed to have and did have and keep accordingly the said carpet bag and the contents aforesaid under her own care, and the same so remained under her own care in the said inn until and at the time of such taking, carrying away and loss as in the said declaration is mentioned, and the defendant further saith, that while the said carpet bag and the contents aforesaid were so as aforesaid under the care of the plaintiff, and before the said taking, carrying away and loss aforesaid, the defendant gave notice to the plaintiff that he would not be liable or responsible for the same if they remained as aforesaid under the care of the plaintiff. And this the defendant is ready to verify, &c.

A similar plea.

And for a further plea in this behalf, the defendant saith, that after the plaintiff was, as in the said declaration mentioned, received into the said inn, and had brought into the said inn the said carpet bag with the contents aforesaid, and before the same were taken and carried away and lost to the plaintiff as in the said declaration is alleged, to wit, on the day and year aforesaid, the defendant requested the plaintiff to allow and permit him the defendant to take care of the said carpet bag and the contents aforesaid, and receive the same into a safe and secure place in that behalf in the said inn, and which

(*h*) The statute 26 Geo. 3, c. 86, s. 3, enacts, that "no master or owner of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons, any loss or damage which may happen to any gold, silver, diamonds, watches, jewels or precious stones, which from and after the passing of this act shall be shipped, taken in or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, owner or owners of such ship or vessel, the true nature, quality and value of such gold, silver, diamonds, watches, jewels or precious stones.

If the action is for the loss of foreign coin, it is only necessary that the value be declared in the current coin of the country where the shipment is made; and it is doubtful whether the statute applies at all to the case of shipments made in foreign countries, at most it can only apply where the shipment is made to England; *Gibbs* v. *Potter*, 10 M. & W. 70.

the plaintiff wholly refused to allow or permit, and then claimed to have and then did have and keep accordingly the said carpet bag and the contents aforesaid under her own care, and the same so remained under her own care in the said inn until and at the time of such taking, carrying away and loss as in the said declaration mentioned. And this the defendant is ready to verify, &c.

See plea, *Fell* v. *Knight*, 8 M. & W. 269.

To an action against an innkeeper for turning the plaintiff out, plea of justification, that the plaintiff insisted upon selecting a particular room, and sitting up all night, &c.

5. For Deceit.

Plea denying consequence of defendant's supposed misrepresentation. (*i*)

And for a further plea in this behalf, the defendant says, that the plaintiff was not, by the said supposed representations and assertions of the defendant in the said declaration in that behalf mentioned, induced to advance, nor did he the plaintiff in consequence thereof advance, to the said Lord E. T. the said sum of £999 in the said declaration mentioned, or any part thereof, or purchase of the said Lord E. T. the said annuities therein mentioned in manner and form as in that behalf alleged. And of this the defendant puts himself upon the country, &c.

6. For Negligence.

See pleas in "*Trover*" and "*Trespass*," *post*.

Plea that the plaintiff was not possessed of the ship, &c.

See *Dunford* v. *Trattles*, 1 D. & L. 554.

Plea that the defendant was not the owner of the ship causing the injury. (*k*)

(*i*) See forms in *Lyde* v. *Barnard*, 1 Tyr. & G. 253, 254. See also pleas to an action for false representations made by the defendants as directors of a joint stock company, *Shrewsbury* v. *Blount*, 2 M. & G. 475. To a declaration in an action for misrepresentation as to the proceedings of an insurance company, setting forth several rules and regulations of the company, and alleging that the defendant fraudulently represented that these rules and regulations had been complied with, knowing the fact to be otherwise, a plea stating that these rules and regulations had been *so fully* complied with as was necessary for the maintenance of the company, and of such insurances as had been or might be effected, is bad; *Pontifex* v. *Bignold*, 3 M. & G. 63; 9 Dowl. 860, S. C. See form of declaration, *ante*, vol. ii. p. 525.

If a party makes an untrue representation to another, for a fraudulent purpose, with the intent to induce the latter to do an act which he afterwards does to his prejudice, an action on the case for deceit lies, and it is not necessary to show also that the defendant *knew* the representation to be untrue; *Taylor* v. *Ashton*, 11 M. & W. 401; but a representation false in fact, but not known to be so by the person who makes it, without fraud, is not actionable; *Collins* v. *Evans*, 13 Law J. R., N. S., Q. B. 180.

(*k*) In an action for negligently navigating a ship, the fact of the defendant being the owner of the vessel causing the injury is not in issue under "not guilty;" *Dunford* v. *Trattles*, 1 D. & L. 554; see also *Taverner* v. *Little*, 5 Bing. N. C. 678; 7 Scott, 796, S. C.; *Hart* v. *Crowley*, 12 A. & E. 378. The defence that the defendant was a shareholder in and director of a French steam-boat company, and that by the law of France the defendant was not liable for the acts of the master of a vessel, but that a body established by that law, and in the nature of an English corporation, were the proprietors of the vessel and alone liable for the acts of the master, need not be specially pleaded, but may be given in evidence under the general issue; *The General Steam Navigation Company* v. *Guillon*, 11 M. & W. 877.

Plea, that at the time of the injury, the vessel was navigating the river Thames under the conduct of a licensed pilot in charge of the vessel, under the 6 Geo. 4, c. 125, and that the damage happened to the plaintiff by the default, incompetency and incapacity of such pilot. (*l*)

See plea, *Lucey* v. *Ingram*, 6 M. & W. 302.

FOR ESCAPES.

Plea to action for an *escape* from execution against the keeper of the Queen's prison, fresh suit and re-caption. (*n*)

7. FOR ESCAPES. (*m*)

And for a further plea in this behalf, the defendant says, that the said judgment and commitment in execution in the [first] count of the said declaration, and the judgment and commitment in execution in the second count mentioned, are one and the same judgment and commitment, and not divers or different judgments and commitments, and that the supposed escape in the said first count and the supposed escape in the said second count mentioned are one and the same escape, and not divers or different escapes, (*o*) and that after the said commitment of the said J. S. to the custody of the defendant in execution as aforesaid, to wit, on the said &c., the said J. S. forcibly and without the knowledge, consent or permission of the defendant, and against his will, escaped from and out of the custody of him the defendant, as such keeper as aforesaid, and fled to places to him the defendant unknown, and that upon the said escape of him the said J. S., he the defendant made fresh and close pursuit after the said J. S. in order to retake him, and did continue such pursuit from thence until he the defendant, afterwards and before the commencement of this suit against him the defendant in this behalf, to wit, on &c. last aforesaid, retook J. S. upon that pursuit, and again had and detained and hath from thence hitherto (*p*) always kept and detained, and doth keep and detain him the said J. S. in the custody of him the defendant, in execution at the suit of the plaintiff, for the said damages, costs and charges, so by him recovered as aforesaid, by virtue of the said commitment of him the said J. S. in execution as aforesaid &c. which said escape in this plea mentioned is the same escape whereof the plaintiff hath above complained against him. And this the defendant is ready to verify, &c.

(*l*) The Pilot Act, 6 Geo. 4, c. 125, s. 56, enacts, "That no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency or incapacity of any licensed pilot, acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this act."

(*m*) The 5 & 6 Vict. c. 98, s. 31, enacts, "That if any debtor in execution shall escape out of legal custody after the passing of this act (10th August, 1842), the sheriff, bailiff or other person having the custody of such debtor shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape." By the 5 Vict. sess. 2, c. 22, the Queen's Bench, Fleet and Marshalsea prisons were consolidated under the name of the Queen's Prison. As to the power of the keeper of the Queen's Prison to avail himself of the illegality of the judgment upon which the prisoner was committed, see the arguments in *Lane* v. *Chapman*, 11 A. & E. 966; 3 P. & D. 668, S. C.

(*n*) See other forms, 5 Wentw. 228; Petersdorff, 194; 2 T. R. 126; 1 B. & P. 413; *Jackson* v. *Hill*, 2 P. & D. 455; where see the form of replication, rejoinder and evidence. It is not necessary in the pleas to traverse a voluntary escape; 1 Saund. 35, n. 1. The statute 8 & 9 W. 3, c. 27, s. 6, renders necessary an affidavit of the defendant, that the prisoner escaped without his knowledge; 1 Saund. 35, n. 1. See form of affidavit, *post*, 267.

(*o*) As to this old mode of pleading, see *ante*, vol. i. p. 581.

(*p*) See 11 East, 406.

Plea to action for escape, that defendant forcibly escaped but has since returned. (q)

And for a further plea in this behalf, the defendant says, that the said judgment and commitment in execution in the first count mentioned and the judgment and commitment in execution in the said second count mentioned are one and the same judgment and commitment in execution and not divers or different judgments and commitments in execution, and that the said supposed escape in the said first count and the said supposed escape in the said second count mentioned are one and the same escape, and not divers or different escapes; and that after the said commitment of the said J. S. to the custody of him, the defendant, in execution as aforesaid, to wit, on &c. aforesaid, he the said J. S. wrongfully, privily and without the knowledge, permission or consent of the defendant, escaped from and out of the custody of the defendant, as such keeper as aforesaid, to places to him the defendant unknown; (r) but the defendant in fact further saith, that the said J. S. afterwards and before the commencement of this suit, to wit, on &c. last aforesaid, voluntarily and of his own accord returned back again into the custody of the defendant as such keeper, and that he the defendant did thereupon then keep and detain, and always from thence hitherto hath kept and detained, and still doth keep and detain (s) him the said J. S. in the custody of him the defendant as such keeper, in execution at the suit of the plaintiff, under and by virtue of the aforesaid commitment in execution as aforesaid, which said escape in this plea mentioned is the same escape whereof the plaintiff hath above complained against the defendant. And the defendant further says, that he the defendant had not any knowledge or notice of the said escape, or of the said J. S. being out of the custody of the defendant during the said time, or any part thereof, whilst the said J. S. was so out of the custody of the defendant and had escaped as above in the declaration in that behalf alleged. (t) And this the defendant is ready to verify, &c.

Plea, that the prisoner escaped twice, and voluntarily returned, and was in custody at the time of commencing the present action.

And for a further plea in this behalf, the defendant says, that the plaintiff commenced this action on &c. and not before or after; and the defendant further says, that after the commitment of the said E. F. to the custody of him the defendant in execution as aforesaid, to wit, on &c. he the said E. F. wrongfully, privily and without the knowledge of the defendant, escaped from and out of the custody of the defendant, as such [keeper] as aforesaid, to places to the defendant unknown; but the defendant further saith, that the said E. F. before the defendant had any notice or knowledge of the said escape, and before the commencement of this present action, to wit, on &c. aforesaid, voluntarily and of his own accord returned back again into the custody of the defendant, and that he the defendant did thereupon then keep and detain him the said E. F. in execution as aforesaid, until the said E. F. afterwards and before the commencement of this suit, to wit, on &c. wrongfully, privily and without the default, knowledge, permis-

(q) See 5 Wentw. 228. This is a good defence to an action for an escape; but it must be pleaded specially, 2 T. R. 126.

(r) The plea must aver that the defendant did not know where the prisoner was during any period of his absence; *Davis* v. *Chapman*, 5 Bing. N. C. 453.

(s) These words are surplusage, and do not render an escape, after the commencement of the suit, and before plea pleaded, admissible in evidence, upon a replication *de injuria*; *Davis* v. *Chapman*, 2 M. & G. 921; 9 Dowl. 645, S. C.

(t) As to this averment, see *Davis* v. *Chapman*, 2 M. & G. 922.

For Escapes.

sion or consent of the defendant, escaped from and out of the custody of the defendant as such [keeper] as aforesaid to places to him the defendant unknown; but the defendant further says, that afterwards and before the defendant had any notice or knowledge of the said escapes, and before the commencement of this suit, to wit, on &c. aforesaid, the said E. F. voluntarily and of his own accord returned back again into the custody of the defendant as such [keeper] as aforesaid, and that he the defendant did thereupon then keep and detain, and always from thence hitherto hath kept and detained, and still doth keep and detain the said E. F. in the custody of the defendant as such [keeper] as aforesaid; and the defendant further saith, that before and at the time of the commencement of this suit the said E. F. was in the actual custody of the defendant as such [keeper] as aforesaid, in execution at the suit of the plaintiff, under and by virtue of the said commitment of the said E. F. in execution as aforesaid, and that he the defendant had no notice or knowledge of the said escapes or either of them, at any time before the commencement of this suit, which said escape in this plea first mentioned is the same escape whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

Plea, that prisoner, being in custody on a render in discharge of bail, escaped without defendant's knowledge, and that he afterwards returned before action brought.

And for a further plea in this behalf, as to the said supposed escape of the said E. F. in the said first count mentioned, the defendant says, that the said E. F. at the time of his said escaping out of the custody of him the defendant as [keeper of the said Queen's Prison], as in the said first count mentioned, the said E. F. then being in the custody of him the defendant, upon such surrender in discharge of the bail of the said E. F. as in the first count mentioned, to wit, on &c. being the said time in the said first count in the said declaration mentioned, with force and arms privately, secretly and clandestinely, against the will and without the knowledge of the defendant, so being the [keeper of the said Queen's Prison], broke the said prison and out of the said prison, and out of the said custody of him the defendant, such [keeper of the said Queen's Prison] as aforesaid, fled and escaped to places to the defendant unknown. And the defendant further says, that before the commencement of this suit, and before the defendant had any notice of the said escape, to wit, on &c. last aforesaid, the said E. F. into the said prison privately, secretly and clandestinely, and without the knowledge of him the defendant, returned, and the said E. F. continually after his return hath been and still is detained by the defendant in prison, under the custody of the defendant, as [keeper of the said Queen's Prison] as aforesaid, by virtue of the said surrender of him the said E. F. in discharge of the bail of him the said E. F. at the suit of the plaintiff as in the said first count mentioned, whereof the plaintiff afterwards, to wit, on &c. last aforesaid had notice; which is the same escape of the said E. F. out of the custody of him the defendant, so being [keeper of the said Queen's Prison] as aforesaid, for which the plaintiff hath above in the said first count of the said declaration complained against the defendant. And this the defendant is ready to verify, &c.

Plea, that prisoner having broke out of prison, defendant made fresh pursuit after

And for a further plea in this behalf, as to the said escape of the said E. F. in the said first count of the said declaration mentioned, the defendant says, that after the surrender of the said E. F. to the custody of him the defendant, in discharge of the bail of him the said E. F., at the suit of the

plaintiff in the said first count of the said declaration mentioned, to wit, on &c. aforesaid (the said E. F. then being in the custody of him the defendant as such [keeper of the Queen's Prison] as aforesaid, at the suit of the plaintiff as aforesaid), he the said E. F. on &c. last aforesaid, with force and arms, without the license or consent and against the will of the defendant, broke the said prison and out of the said prison, and out of the custody of him the defendant, as [keeper of the Queen's Prison] as aforesaid, fled and escaped to places to the defendant unknown. And the defendant further says, that immediately after the said escape of the said E. F., to wit, on &c. last aforesaid, he the defendant made fresh and diligent pursuit for the retaking of the said E. F., and that he the defendant made and continued that pursuit from thence from place to place until he the defendant afterwards and long before the commencement of this suit, to wit, on &c. aforesaid, retook the said E. F. upon that pursuit, and thereupon again had and detained him the said E. F. in prison under the custody of him the defendant as [keeper of the Queen's Prison] as aforesaid, by virtue of the said surrender in discharge of the bail of the said E. F., at the suit of the plaintiff, as in the said first count of the said declaration is mentioned, and still doth detain the said E. F. in his custody aforesaid, for the cause aforesaid; of which &c. [*Conclude with notice to plaintiff as in last plea.* (*x*)

him, and retook him. (*u*)

And for a further plea in this behalf, the defendant says, that after the said surrender and commitment of the said E. F. in the said several counts of the said declaration mentioned, and before the said E. F. was by the defendant permitted and suffered to go out of his custody at large and abroad wheresoever he would and pleased and without restraint, as in the said several counts of the said declaration is alleged, to wit, on &c., the plaintiff did consent that the said E. F. should be discharged out of the custody of the defendant, so being [keeper of the Queen's Prison] as in that behalf is mentioned, as to the said several actions and suits in the said several counts of the said declaration mentioned, and whereupon the said E. F. had been committed to the custody of him the defendant, and did give license to the defendant to discharge the said E. F. out of the custody of the now defendant as to the said several actions and suits, and permit and suffer him to go out of the custody of him the now defendant at large and abroad wheresoever he would and pleased and without restraint; and thereupon the now defendant did then discharge the said E. F. out of his custody as to the said several actions and suits, and permit and suffer him to go out of the custody of the defendant at large and abroad wheresoever he would and pleased and without restraint; without this, that the now defendant did voluntarily, wrongfully and freely, and without the leave or license of the plaintiff,

Plea that the prisoner was discharged with the plaintiff's consent. (*y*)

(*u*) By 8 & 9 W. 3, c. 27, s. 6, this plea must be specially pleaded.

(*x*) File affidavit, as *post*, 267.

(*y*) As to plea that the plaintiffs fraudulently and covinously conspired to arrest the prisoner if he went beyond the rules, (previous to the 5 Vict. sess. 2, c. 22, abolishing the liberty of the rules,) and so have the action for escape, &c., see *Merry* v. *Chapman*, 10 A. & E. 516; 3 P. & D. 25, S. C.

The plaintiff's attorney, as such, has no general authority to order the discharge of the defendant in execution without payment of the debt; and therefore, in an action against the marshal for an escape, it was held that he could not justify the discharge of such a defendant under the order of the plaintiff's attorney, without showing either that the plaintiff had authorized the order, or that the debt had been paid; *Savory* v. *Chapman*, 11 A. & E. 829; 3 P. & D. 604, S. C.

FOR ESCAPES.

permit or suffer the said E. F. to go and escape out of the said custody of the defendant, so being [keeper of the Queen's Prison] as aforesaid, in manner and form as the plaintiff hath above thereof complained against him. And this the defendant is ready to verify, &c.

Plea that plaintiff consented that prisoner should go at large. (s)

And for a further plea in this behalf, the defendant saith, that he permitted and suffered the said T. to go at large out of the said prison and out of the custody of the defendant with the license and consent of the plaintiff for that purpose first had and obtained, to wit, on &c., without this, that he the defendant did permit and suffer the said T. to escape and go at large out of the said prison, and out of the custody of him the defendant, without the license and consent and against the will of the plaintiff, in manner and form as in the said declaration is alleged in this behalf. And of this the defendant puts himself upon the country, &c.

Plea, to declaration for an escape after debtor had been committed to defendant's custody, that debtor, after his commitment, petitioned Insolvent Court for his discharge from imprisonment, and was remanded at the plaintiff's suit for nine months, at the expiration of which defendant discharged him. (a)

And for a further plea in this behalf, the defendant saith, that after the said S. T. had been and was committed and remanded to the custody of the defendant as such keeper, as in the said first and second counts mentioned, and whilst he the said S. T. was in the defendant's said custody, to wit, on the —— day of ——, A. D. 18—, the said S. T. filed and exhibited his petition in and to the Court for the Relief of Insolvent Debtors, pursuant to an act made and passed in the second year of the reign of our lady the now queen, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for Amending the Laws for the Relief of Insolvent Debtors in England," for his discharge from such imprisonment, and such proceedings were thereupon had in the matter of the said petition, that afterwards, to wit, on the —— day of ——, in the year of our Lord ——, aforesaid, by a certain order of the said last-mentioned Court, then duly made pursuant to the said statute, in the matter of the said petition, directed to the said keeper, it was ordered and adjudged that the said S. T. should be discharged from the said custody of the defendant as such keeper, as to the said detainer of the plaintiff, at the period of nine calendar months, to be computed from the said —— day of —— then last, to wit, the said —— day of ——, A. D. ——, being the time of filing the said petition, and that for so discharging him the said S. T. from such custody as to the said detainer, the said order should be his the defendant's sufficient warrant. And it was and is thereby directed, that the said S. T. should be confined during the period aforesaid within the walls of the said prison, and thereupon the defendant kept and detained the said S. T., so then being such prisoner as aforesaid, in custody within the walls of the said prison as aforesaid until the expiration of the said period of nine calendar months;

(s) See form in Petersdorff, 193.

(a) Mr. (now Lord) Campbell and Mr. Chitty thought this was a good defence under the plea of *nil debet*, before the rules of pleading, Hil. T. 4 W. 4, and before the action of debt was taken away; but that it would be better to plead specially, in order to compel the plaintiff to reply specially, that after the debtor petitioned for his discharge, he applied for and obtained the benefit of the Lords' Act, and received his sixpences, and which Mr. Campbell and Mr. Chitty considered did not affect the marshal's right to discharge the debtor at the expiration of the nine months. See *Saffery* v. *Jones*, 2 Bar. & Adol. 599.

FOR ESCAPES.

and at the expiration thereof, the defendant, pursuant to such order of the said Court for the Relief of Insolvent Debtors, did discharge the said S. T., so then being such prisoner as aforesaid, out of his the defendant's said custody, and suffered and permitted the said S. T. to escape and go at large out of the said prison and out of the custody of the defendant wherever the said S. T. would, without restraint as to the said detainer of the plaintiff, as the defendant lawfully might for the cause aforesaid, which is the said supposed escape in the said first count mentioned, and whereof the plaintiff hath above thereof complained against the defendant. And the defendant further saith, that he kept and detained the said S. T. in the custody of him the defendant as such keeper, in execution upon and by virtue of the judgment in the said declaration mentioned, continually from the time the said S. T. was committed and first came to the said custody of the defendant as aforesaid, until the said S. T. was entitled to be discharged and was discharged out of such custody of the defendant, by virtue and in pursuance of the said order of the said Court for the Relief of Insolvent Debtors. And this the defendant is ready to verify, &c.

See plea, *Contant* v. *Chapman*, 2 Q. B. Rep. 774; 2 G. & D. 192, S. C.

Plea, that while the prisoner remained in the defendant's custody under an order of the Insolvent Court, he was removed by habeas corpus to the Central Criminal Court, and thereupon committed to Newgate, with a special traverse that the prisoner was in the defendant's custody.

In the Queen's Bench,

Between { T. A. . . . . Plaintiff, and B. T. Esq. . . . . Defendant.

Affidavit on 8 & 9 Will. 3, c. 27, s. 6, by keeper of the Queen's Prison &c., that the escape for which he is sued was without his knowledge. (*b*)

B. T. of &c. Esq., the defendant in the above cause, maketh oath and saith, that if J. S. the prisoner, for whose escape this deponent is sued at the suit of the plaintiff in the above cause, did in fact make such escape, he the said J. S. did make such escape without the consent, privity or knowledge of him this deponent.

Sworn, &c. B. T.

8. By Sheriff.

By Sheriff.

To action for false return of nulla bona to writ of fi fa., alleging a seizure by defendant, plea that the defendant did not seize nor levy. (*c*)

And for a further plea in this behalf [to the —— count of the declara-

(*b*) See 1 Saund. 35, n. 1. This affidavit, by the above statute, is absolutely necessary to support the plea, and if the plea be delivered without such affidavit, it may be treated as a nullity. See as to form of affidavit, 2 Bla. Rep. 1059.

(*c*) See *Heenan* v. *Evans*, 1 Dowl. N. S. 204; *Wintle* v. *Freeman*, 11 A. & E. 540; 1 G. & D. 94, S. C. Where the plea adopts the terms of the declaration, it must be construed with reference to the meaning of the declaration, and the allegation that the defendant did not seize any goods of C. must be taken to mean that he did not seize any goods liable to execution at the suit of the plaintiff, and although the plaintiff proves a formal seizure, such proof does not entitle him to recover in respect of the allegation in the plea that the defendant did not seize nor levy, for such allegation is not to be taken disjunctively; and the levying of the monies in the declaration, being the substantial issue, is unsupported by proof of a seizure only; *Heenan* v. *Evans*, 1 Dowl. N. S. 204. To an action for not selling goods of W. seized by the defendant and false return, a plea that the defendant did not take in execution any goods of the defendant in the original action, or remain in possession by virtue of the said writ for the said space of time or any part thereof, is bad for duplicity; *Rowe* v. *Ames*, 6 M. & W. 747; 8 Dowl. 750, S. C.; and a plea that W. became bankrupt, and his goods vested in the official assignee, is bad, as being an argumentative denial of the seizure of the goods of W.; *id. ibid.*

By Sheriff. tion] the defendant says, that he did not seize or take in execution any goods of the said J. R., nor levy thereout the monies in the [—— count] of the declaration in that behalf mentioned, or any part thereof, in manner and form as the plaintiff has in the [said —— count of the] declaration above thereof alleged. And of this the defendant puts himself upon the country, &c.

Plea to same action, *nulla bona*. (*d*)

And for a further plea in this behalf, the defendant says, that the said J. R. had not any goods or chattels in the defendant's bailiwick, whereof he the defendant could cause to be made the said damages in the declaration mentioned, or any part thereof, according to the exigency of the said writ. And this the defendant is ready to verify, &c.

To action for delaying the execution of a writ of habere facias possessionem, plea that the judgment was set aside. (*e*)

See *Mason* v. *Paynter*, 1 Q. B. Rep. 974; 1 G. & D. 382, S. C.

Patents, &c,

9. Patents, &c.

Plea, for infringing an alleged patent right, that the plaintiff was not the first inventor.

And for a further plea in this behalf, the defendant says, that the plaintiff was not at the time of the making of the said letters-patent the true and first inventor of [the said alleged improvements in extracting sugar or syrups from cane juice and other substances containing sugar, and in refining sugar and syrups] in manner and form as the plaintiff has in the declaration in that behalf above alleged. And of this the defendant puts himself upon the country, &c.

Plea that the plaintiff did not describe the nature of his patent in writing. (*f*)

And for a further plea in this behalf, the defendant says, that the plaintiff did not by any instrument in writing particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed, in manner and form as the plaintiff has in the declara-

(*d*) See *Wintle* v. *Freeman*, 11 A. & E. 540; 1 G. & D. 94, S. C.; *Heenan* v. *Evans*, 1 Dowl. N. S. 204. This plea in *Wintle* v. *Freeman* concluded with a verification, but if it be a mere traverse of part of the declaration it should conclude to the country. Evidence of payments by the sheriff of the proceeds of the execution, either in discharge of rent or of a prior writ, will support this plea; *Wintle* v. *Freeman*, *supra*; *semble*, the facts might be given in evidence under "not guilty;" per Lord Denman, C. J. *id. ibid.*; or at least under a traverse of the seizure, *Wright* v. *Lainson*, 3 M. & W. 44; and a special plea of the facts is bad, *Drewe* v. *Lainson*, 3 P. & D. 245; 11 A. & E. 537. S. C. As to the right of the sheriff to appropriate money of the defendant in the original action, received and placed in a bank by a former sheriff, see *Harrison* v. *Paynter*, 8 Dowl. 349.

(*e*) Where to a count for a false return to a fieri facias on a judgment of the Queen's Bench against B., the defendant pleaded, that after the suing out the said writ, and after the said return, the plaintiff sued B. in the Queen's Bench on the said judgment, and recovered judgment thereon, which still remained in force, by means of which premises the said judgment in the said count mentioned became merged and satisfied, the fi. fa. abandoned, and the defendant discharged, it was held on special demurrer that the plea was no answer; *Pitcher* v. *King*, 1 P. & D. 297. It is the duty of the sheriff in executing a fi. fa. to possess himself of all the goods of the debtor within his bailiwick, or of sufficient to satisfy the execution, and therefore to an action on the case by the execution creditor against the sheriff for a false return that the goods remained in his hands for want of buyers, a plea by the sheriff that he seized certain goods (specifying them), and other goods of the debtor in his bailiwick, and that while he was in possession of the goods, he was directed by the execution creditor to withdraw from the possession of all the goods but those specified, and that he was unable to find buyers of the specified goods, which consequently remained in his hands for want of buyers, was held ill; S. C., 13 L. J. Rep. N. S. Q. B. 162.

(*f*) See *Galloway* v. *Bleaden*, 1 M. & G. 248; *Neilson* v. *Harford*, 8 M. & W. 806.

tion in that behalf above alleged. And of this the defendant puts himself upon the country, &c.

Plea that no specification was enrolled. (*g*)

And for a further plea in this behalf, the defendant says, that the plaintiff did not cause any instrument in writing particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed, to be enrolled in her Majesty's High Court of Chancery, in manner and form as the plaintiff has in the declaration in that behalf above alleged. And of this the defendant puts himself upon the country, &c.

Plea that the invention was not when the letters-patent were granted a new invention. (*h*)

And for a further plea in this behalf, the defendant says, that the said alleged invention or discovery in the said letters-patent and instrument in writing mentioned, described and ascertained, was not, before and at the time of the making of the said letters-patent, a new invention as to the public use and exercise thereof in that part of the united kingdom of Great Britain called England, Wales or Berwick-upon-Tweed, nor was the same invented or found out by the plaintiff, by reason whereof the said letters-patent were wholly void. And this the defendant is ready to verify, &c.

Plea, that the letters-patent procured by fraud, &c.

See *Russell* v. *Ledsham*, 11 M. & W. 647; 1 D. & L. 347, S. C.

and the Report of the Privy Council whereon they were founded were procured by fraud, covin and misrepresentation. (*i*)

In the Q. B. ["C. P." *or* "Exch."]

Notice of objections under 5 & 6 Will. 4, c. 83. (*k*)

A. B. v. C. D. } Take notice, that the defendant means on the trial of this cause to rely on the following objections to the validity of the patent in the declaration mentioned: *First*, That the said C. W. was not the

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(*g*) See *Russell* v. *Ledsham*, 11 M. & W. 647; *Carpenter* v. *Smith*, 9 M. & W. 300; see also *Munts* v. *Foster*, 1 D. & L. 737.

(*h*) See *Cornish* v. *Keene*, 3 Bing. N. C. 572. Under a plea that the alleged invention is not a new manufacture, the question whether it is a manufacture within the statute is involved; 3 M. & G. 774. A plea to a declaration for infringing a patent, alleging that "the invention was not, at the time of making the letters-patent, a new manufacture within this realm, within the true intent and meaning of the act of parliament in that case made and provided," is bad for ambiguity, because it is doubtful whether the defence set up is that the manufacture was not new, or that it was not within the statute 21 Jac. 1, c. 3, ss. 5, 6; *Spilsbury* v. *Clough*, 2 G. & D. 17; but see *Walton* v. *Bateman*, 3 M. & G. 773. *Semble*, that the plea might be good, as containing an entire defence in one connected proposition, if the words in the last-mentioned section in favour of letters-patent, "of the sole working or making of any manner of new manufacture within this realm," were embodied in the plea; *Spilsbury* v. *Clough*, *supra*. See pleas in *Gibson* v. *Brand*, 4 M. & G. 179. The "public use and exercise" of an invention which prevents its being considered a novelty, is a use *in public*, so as to come to the knowledge of others than the inventor, as contradistinguished from the use of it by himself in private, and does not mean a use by *the public generally*; *Carpenter* v. *Smith*, 9M. & W. 300.

(*i*) In an action for infringing a patent, to part of which a disclaimer has been entered under the 5 & 6 Will. 4, c. 83, the defendant will not be allowed to plead that the whole invention was not new, and also that the undisclaimed part was not new; *Clark* v. *Kenrick*, 12 M. & W. 219; 1 D. & L. 392, S. C.

(*k*) Section 5 of this statute enacts, "that any action brought against any person for infringing any letters-patent, the defendant, on pleading thereto, shall give to the plaintiff a notice of any objections on which he means to rely at the trial of such action." The court or a judge, under their general jurisdiction, as well as under the statute, may order a further and fuller notice; *Bullnois* v. *Mackenzie*, 4 Bing. N. C. 127. Section 6 enacts, that in taxing the costs of such actions, regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the presiding judge, and the costs of each part of the case shall be given according as either party has succeeded or failed therein, regard being had to the no-

PATENTS, &c.

true and first inventor of the alleged [improvements in manufacturing tubes for gas and other purposes]. (*l*) *Secondly*, That the specification in the declaration mentioned did not sufficiently describe the nature of the invention, and the manner in which it was to be performed. (*m*) *Thirdly*, That the said alleged [improvements in manufacturing tubes for gas and other purposes] were not, nor was any part thereof, (*n*) at the time of the granting of the letters-patent in the declaration [first] mentioned, new. *Fourthly*, That the said [second] letters-patent, and the report of the Judicial Committee of the Privy Council, whereon the said letters-patent were founded, were obtained by fraud and misrepresentation, in this, to wit, &c. [*specifying the nature of the alleged fraud.*] (*o*) Dated, &c.

Your's,

To A. B., the plaintiff above-named. E. F., defendant's attorney.

Pleas, that the plaintiff was not the proprietor of the copyright at the time of committing the grievances; and also that he was not the proprietor when the book was printed.

See *Chappell* v. *Purday*, 12 M. & W. 303; and see 5 & 6 Vict. c. 45.

PLEAS RELATIVE TO EASEMENTS AND PRESCRIPTIVE RIGHTS.

10. PLEAS RELATIVE TO EASEMENTS AND PRESCRIPTIVE RIGHTS.

Denial of plaintiff's lawful possession of messuage at time of alleged grievance.

And for a further plea in this behalf, the defendant says, that the plaintiff was not, at the time of the committing of the alleged grievances in the declaration mentioned, and is not lawfully possessed of the said messuage and appurtenances in the declaration mentioned. And of this the defendant puts himself upon the country, &c.

Denial of right to ancient lights, and of wrongful erection of obstructions. (*p*)

And for a further plea in this behalf, the defendant says, that in the said building or malthouse, during all or any part of the said time, &c. there were not, nor of right ought to be, any ancient openings or lights as above alleged; and that the said fence was not nor is wrongfully or injuriously erected and kept, and continued near to the said openings or lights, in man-

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tice of objections as well as the counts in the declaration, and without regard to the general result of the trial. The effect of the statute is to make the objections separate issues; and the judge's certificate should be as to the determination of each objection of which notice has been given, and not as to the issues in the pleadings; *Losh* v. *Hague*, 5 M. & W. 387. If the notice of objections be not sufficiently specific, the plaintiff's course is to apply to a judge at chambers for an order for the delivery of a more specific notice; but if he omit to do so, he cannot object at the trial to the generality of the notice: the only question then is, whether the notice is sufficiently large to include the objections relied on by the defendant; *Neilson* v. *Harford*, 8 M. & W. 806, where see form of notice.

(*l*) The notice need not state who the first inventor was, or under what circumstances the invention had been previously used; *Russell* v. *Ledsam*, 11 M. & W. 647; 1 D. & L. 347, S. C.

(*m*) See *Heath* v. *Unwin*, 10 M. & W. 684.

(*n*) The defendant must specify whether he objects to the patent generally on that ground, or to part only, and if so, to what part; *Russell* v. *Ledsam*, 11 M. & W. 647; *Heath* v. *Unwin*, 10 M. & W. 685.

(*o*) The notice must state the species of fraud, covin and misrepresentation by which the patent was procured; *Heath* v. *Unwin*, *supra*.

(*p*) See form of this plea, *Garrett* v. *Sharpe*, 3 Ad. & Ell. 325. A custom of building so as to darken ancient windows cannot be set up as a defence to an action for obstructing such lights by building; *Salters' Company* v. *Jay*, 2 Q. & D. 414.

ner and form as the plaintiff has in the said declaration above thereof alleged. And of this the defendant puts himself upon the country, &c.

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Denial of right to use of ancient lights. (q)

And for a further plea in this behalf, the defendant says, that at the time of the committing of the alleged grievances in the declaration mentioned, there were not nor ought there to have been, nor ought there to be, any such windows through which the light or air ought to have entered or to enter into the said messuage and appurtenances in the manner or for the purposes in the declaration alleged. And of this the defendant puts himself upon the country, &c.

Plea denying plaintiff's right to use of watercourse, by reason of possession of his mill, and plea of justification that plaintiff had wrongfully penned back water.

See *Frankum* v. *Lord Falmouth*, 2 Ad. & E. 452; 4 Dowl. 65, S. C.; see also 6 C. & P. 529.

Pleas, denying plaintiff's right to use of watercourse, &c. (r)

And for a further plea in this behalf, as to the part of the said declaration which relates to the said channel, drain, gutter or sewer in the said declaration mentioned, the defendant says, that the surplus or foul water, and other filth, which from time to time arose and were collected and proceeded from the said messuage or premises of the plaintiff, were not, during all the time aforesaid, used and accustomed, nor of right ought, to enter, flow, pass and be carried away from and off the said premises of the plaintiff into the said premises of the defendant, in manner and form as the plaintiff hath in his said declaration in that behalf alleged. And of this the defendant puts himself upon the country, &c.

And for a further plea in this behalf, as to that part of the said declaration which relates to the eaves and thatch of the said wall in the said declaration mentioned, the defendant says, that the plaintiff was not, during all the time aforesaid, entitled to the benefit, easement, privilege and advantage of having and permitting the eaves and thatch of the said wall to extend and project a convenient space beyond and from the said wall over and upon the said premises so as aforesaid in the possession or occupation of the defendant for the convenience and use of conveying and carrying off and from his said wall and the thatch thereof, the rain which from time to time descended and fell thereupon. And of this the defendant also puts himself upon the country, &c.

To action for damming up water and flooding plaintiff's premises, plea of prescriptive right by defendant as occupier of a mill. (s)

And for a further plea in this behalf, as to keeping and continuing erected and placed on the said premises of him the defendant, at the said times, when &c. in, upon and over the said stream lower down in the course thereof than the said premises of the plaintiff, the said dams, boards and erections in the said declaration mentioned to have been theretofore erected

(q) See *Flight* v. *Thomas*, 11 A. & E. 688; 3 P. & D. 442, S.C.

(r) See form in *Thomas* v. *Thomas*, 2 Crom. Mee. & Ros. 37; *Magor* v. *Chadwick*, 8 P. & D. 367. A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is an easement and *not* a profit *a prendre* in the soil of another, and must be pleaded to accordingly; *Manning* v. *Wasdale*, 5 A. & E. 758; 1 N. & P. 172, S.C.

(s) In case for an injury to the plaintiff's reversionary interest by the defendant's ob-

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and placed on the premises of the said defendant, in, upon and over the said stream lower down in the course thereof than the said premises of the said plaintiff, and as to closing and shutting and keeping, and continuing closed and shut, the said sluice in and upon the said premises now of the said defendant, through which, at the several times aforesaid, the said brook or stream might and otherwise would have flowed freely and without obstruction, and as to obstructing, damming up, penning back and stopping up by the several means in this plea aforesaid the water of the said stream and thereby causing certain small quantities of the water of the said brook or stream to flow, run and come, on the days and times in the said declaration in that behalf mentioned, into and upon the said land, yard and garden of the said plaintiff; the said defendant saith, that long before and at the said several times, when &c. he the said defendant was the occupier of the said mill and premises of the said defendant in the said declaration mentioned, with the appurtenances. And the defendant further says, that he the said defendant and all the occupiers for the time being of the said mill and premises have, and each of them hath had and actually enjoyed, as of right and without interruption, for the full period of twenty years next before the commencement of this suit, a certain right, benefit and easement for himself and themselves, so for the time being and occupiers as aforesaid, to wit, of erecting and placing, and keeping and continuing erected and placed, divers boards and erections on the said premises now of the said defendant, in, upon and over the said stream lower down in the course thereof than the said premises of the said plaintiff, to wit, of a certain height, that is to say, of the height of 10 inches above the bed of the said stream, as often as occasion required for the due working of the said mill, and of closing and shutting, and keeping and continuing closed and shut, as often as occasion required for the purpose aforesaid, a sluice in and upon the said premises now of the defendant, through which at the said times the said brook or stream might and otherwise would have flowed freely and without obstruction, to wit, a sluice of a certain height, that is to say, of the height of 10 inches above the bed of the said stream, and of obstructing, damming up, penning back and stopping up by the means and in manner and on the occasion aforesaid the water of the said stream, and causing to flow, run and come into and upon the said land, yard and garden now of the said plaintiff, such small quantities of the said water as were by the means aforesaid necessarily and unavoidably forced upon and into the said land, yard and garden respectively, doing no unnecessary damage to the said plaintiff or the occupiers for the time being of the said land, yard and garden on those occasions; wherefore the said defendant, at the said times, when &c., being the occupier of the said mill and premises as aforesaid, and having occasion to work his said mill, did, in order thereto, and because the said mill could not on those occasions be otherwise duly worked, keep and continue erected

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struction to a watercourse on his land, and thereby sending water upon and under the house and land in the occupation of the plaintiff's tenant, a plea that the obstruction was caused by the neglect of the plaintiff's tenant to repair a wall on the demised land, that in consequence it fell into the watercourse, and caused the damage, and that within a reasonable time after the defendant had notice he removed it, was held bad, as not showing any obligation on the tenant to repair the wall merely as terre-tenant; *Bell* v. *Twentyman*, 1 G. & D. 223. *Quære*, Whether it would have been good if it had; *Id. ibid.*

and placed on the said premises of the said defendant, in, upon and over the said stream lower down in the course thereof than the said premises of the said plaintiff, the said dams, boards and erections in the introductory part of this plea mentioned, before then there erected and placed for the purpose aforesaid, and then being of a certain height only, to wit, of the height of 3 feet 10 inches above the bed of the said stream, and did also on the occasions and for the purpose aforesaid, and because his said mill could not otherwise be duly worked, close and shut, and keep and continue closed and shut, for certain usual, necessary and reasonable time in that behalf, the said sluice in the introductory part of this plea mentioned in and upon the said premises of the defendant, and through which the said brook or stream, at the several times aforesaid, otherwise might and would have flowed freely and without obstruction, the same sluice being of a certain height only, to wit, of the height of three feet ten inches above the bed of the said stream, and by means aforesaid, the said defendant on those occasions necessarily obstructed, dammed up, penned back and stopped up the water of the said stream, and necessarily caused to flow, run and come into and upon the said land, yard and garden of the said plaintiff such small quantities of the said water as was by the means aforesaid necessarily and unavoidably forced upon and into the said land, yard and garden, the said defendant doing no unnecessary damage to the said plaintiff on the occasions aforesaid, or any of them, as it was right for the defendant to do for the cause and on the occasion as aforesaid, and which are the same supposed grievances in the introductory part of this plea mentioned, and whereof the plaintiff has also complained against him. And this the defendant is ready to verify, &c.

Plea under 2 & 3 W. 4, c. 71, of enjoyment of an easement for forty years, viz. to place in pits sunk, mentioned in the declaration, the water pumped or raised out of mines, in order to precipitate copper. (t)

And for a further plea in this behalf, the defendant says, that before and at the time of the committing of the grievances &c. the Most Noble Henry William, Marquis of Anglesea, was *the occupier* of the said lands and premises in and upon which the said pits, holes and works were so made and sunk as in the first count mentioned, and was also the occupier of a certain mine, to wit, a copper mine on the said lands and premises, and which said mine, for a period exceeding the period of *forty years* next before the commencement of this suit, (u) and also at the time of the committing of the said alleged grievances, had been and was worked by the occupier thereof for the time being. And the defendants further say, that the said marquis and all the occupiers for the time being of the said mine and of the said

(t) See plea and replication in *Wright* v. *Williams*, 1 Tyr. & G. 375; 3 Crom. Mees. & Ros. 77, S. C. And see the statute and law, 1 Chitty's Gen. Prac. 285, 286. See other pleas, *post*, in *Trespass*. To an action for causing offensive stenches to come over the plaintiff's land, the defendant pleaded a prescriptive right to the use of a mixen from which the stenches arose, and it was held that the plaintiff was entitled to judgment *non obstante veredicto*, as the plea did not state that the *stenches* had for the period prescribed *passed over the plaintiff's land*; *Flight* v. *Thomas*, 2 P. & D. 531; 7 Dowl. 742, S. C. To an action for injuries to a dwelling-house by the removal of mines and minerals, see plea denying plaintiff's right to the support of the mines, &c. *Partridge* v. *Scott*, 3 M. & W. 220.

(u) The plea must, in conformity with the 2 & 3 Will. 4, c. 71, s. 4, claim the right for forty &c. years, before the commencement of "some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question," which, generally speaking, would be next before the commencement of the suit in which the pleading takes place; *Richards* v. *Fry*, 7 A. & E. 698; 3 N. & P. 67, S. C. See also *Wright* v. *Williams*, 1 M. & W. 77; 1 Tyr. & G. 375, S. C. It is not, however, necessary to insert the word "next" before, &c.; *Jones* v. *Price*, 3 Bing. N. C. 52. See notes to the pleas in trespass, *post*.

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land and premises wherein the said pits &c. were so made and sunk as in the first count mentioned, for the full period of forty years next before the commencement of this suit, have, as of right, (*x*) without interruption, made and sunk, and caused to be made and sunk, in and upon the said lands and premises, such pits, holes and works as from time to time were convenient and necessary for placing therein the water from time to time raised or pumped out of the said mine, and for the precipitation of the copper contained in the said water, and the said marquis and all the occupiers for the time being of the said mine, lands and premises, for the purpose of such precipitation of the copper contained in the water so from time to time raised and pumped out of the said mine, have from time to time, for and during all the said period of forty years, without interruption and as of right, put, placed and laid into the said pits &c. such iron and other metals and metallic substances as to them seemed convenient and necessary, and there in the said pits &c. covered the same with the water from time to time raised and pumped out of the said mine, and caused to run and flow into the said pits &c. and have kept and continued the said iron and other metals and metallic substances, so put, placed and laid, and so covered with the said water in the said pits &c. for such long spaces of time as to them seemed convenient and necessary, whereby the said water in the said pits &c. during all the said period of forty years, necessarily and unavoidably became and was mixed and impregnated with iron and other metallic and noxious mineral substances. And the defendants further say, that the said marquis and all the occupiers for the time being of the said mine, and of the said lands and premises wherein the said pits &c. were so made and sunk, as in the first count mentioned, for and during the full period of forty years, have as of right, at his and their free will and pleasure, and without interruption, let off, emptied and discharged, and of right ought to have so let off &c., and still of right ought to let off &c., the said water so mixed and impregnated with iron and other metallic and noxious mineral substances, from and out of the said pits &c. unto and into the said stream or watercourse in the first count mentioned, and so running and flowing into, through, over and along the said closes &c. in that count also mentioned, wherefore the defendants, then being the servants of the said marquis and acting by his command at the said time when &c. in the first count mentioned, made and sunk, and caused to be made and sunk, in the said lands and premises, the said pits &c. in that count mentioned, the same then being convenient and necessary pits &c. for the placing therein the water from time to time raised and pumped out of the said mine, and for the precipitation of the copper contained in the said water, and the defendants, as such servants of the said marquis, and by his command, at the time when &c. for the purpose of the precipitation of the copper contained in the water so from time to time raised and pumped out of the said mine, put, placed and laid iron and other metals and metallic substances into the said pits &c., and there in the said pits &c. covered the said iron and other metal and metallic substances with water raised and pumped out of the said mine, and caused to run and flow into the said pits &c. and kept and continued the same iron and other metals and metallic substances so covered with water in the said pits &c. for the said spaces of time in the first count mentioned, whereby the said water necessarily and

(*x*) See *Halford* v. *Hankinson*, 13 L. J. R., N. S., Q. B. 115.

unavoidably became and was mixed and impregnated with iron and other metallic and noxious mineral substances. And the defendants, as such servants of the said marquis, and by his command, afterwards, and at the said several times when &c. in the first count mentioned, let off, emptied and discharged the said water, so mixed and impregnated as in this plea mentioned, from and out of the said pits &c. unto and into the said stream or watercourse in the first count mentioned, as it was lawful for them to do, which are the said several grievances in the first count mentioned, and whereof the plaintiffs have above in that count complained against them the defendants. And this the defendants are ready to verify, &c.

By commoner for disturbance of common by putting on cattle, plea of right of common appurtenant for cattle levant and couchant. (x)

And for a further plea in this behalf, the defendant says, that before and at the said several times, when &c. the defendant was and still is possessed of and in certain land, with the appurtenances, situate &c.; and the defendant further says, that the occupiers of the said land, with the appurtenances, as of right, (y) now have, and for and during the period of sixty years and upwards next before the commencement of this suit, as of right, (y) and without interruption, have used, and been used and accustomed to have and use, without interruption, and as of right ought to have and use, and the defendant as occupier of the said land of right ought to have and use, common of pasture in, upon and throughout the said place, called &c., for all his and their cattle levant and couchant in and upon the said land, with the appurtenances, every year, and at all times of the year, as to the said land with the appurtenances belonging and appertaining; and the defendant further says, that being so possessed, and being so entitled to the said right of common, he the defendant afterwards, and at the said several times, when &c. in the said declaration mentioned, put, and caused to be put, the said cattle in the declaration mentioned, being the defendant's own commonable cattle levant and couchant in and upon the said land, with the appurtenances, of the defendant, to use the said common of pasture of the defendant there, and kept and detained the same there for the said space of time in the declaration mentioned for the purpose aforesaid, as he lawfully might for the cause aforesaid, which is the same putting and causing to be put of cattle as in the declaration mentioned, and whereof the plaintiff has above complained against the defendant. And this the defendant is ready to verify, &c.

See plea, *Patrick* v. *Stubbs*, 9 M. & W. 830.

By commoner for disturbance of common by erecting two cottages thereon, plea justifying under the lord of the manor, that the houses were erected for the habitation of woodwards to protect the woods, &c. on the common. (z)

(x) See *Bowen* v. *Jenkin*, 6 A. & E. 911. Where the plaintiff replied that all the said cattle in the said declaration mentioned were not the defendant's own commonable cattle levant and couchant in manner, &c.; it was held, that the defendant maintained his issue by showing, that on the occasion of every alleged disturbance some of the cattle put on were levant and couchant, and that on these pleadings the plaintiff could not insist on a surcharge; and the word "all" was interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle, and not that it was truly alleged of some and falsely of others; *id. ibid.*

(y) See *Halford* v. *Hankinson*, 13 L. J. R., N. S., Q. B. 115.

(z) The owner of a common may erect thereon a house necessary for the habitation of a woodward to protect the woods and underwoods on the common. So he may erect a house necessary for the habitation of beast keepers for the care of the cattle of himself and the other persons having rights of common there, and a plea justifying the erection of a house for such beast keepers need not state the names of the other commoners, nor that they assented to the appointment of beast keepers; *Patrick* v. *Stubbs*, 9 M. & W. 830.

To same action, plea of approvement by the lord. (s)

See *Patrick* v. *Stubbs*, 9 M. & W. 830.

In case, by the reversioner of a house for damage done to it by the obstruction of its lights by a railway station, plea of justification under the railway act. (a)

And for a further plea in this behalf, as to so much of the declaration as relates to the alleged hindrance and prevention, by the means therein mentioned, of the light and air from coming and entering into and through the said windows &c., and as to the supposed causes of action in respect thereof, the defendants say, that they the defendants, before and at the time of the committing of the said alleged grievances, were, and still are, the body corporate mentioned in a certain act of parliament, made and passed in the seventh year of the reign of his late majesty King William the Fourth, intituled "An Act for making a Railway from Sheffield to Rotherham," and also in a certain other act of parliament made and passed in the third year of the reign of her present majesty Queen Victoria, intituled "An Act to enable the Sheffield and Rotherham Railway Company to raise a further sum of Money, and to amend the Act relating to the said Railway." And the defendants further say, that the said land so in the possession of the defendants as in the declaration mentioned was, before and at the time of the committing of the said alleged grievances to which this plea is pleaded, and still is, land purchased by the defendants after the passing of the said first-mentioned act of parliament, in pursuance of the powers and provisions therein contained, for the purpose of making and providing a certain station, warehouses and other buildings and conveniences for receiving, depositing, loading and keeping goods, matters and things conveyed and intended to be conveyed upon the said railway in the said act mentioned, and for other purposes connected with the undertaking thereby authorised. And the defendants further say, that the said railway station, wall and embankment in the declaration mentioned were so erected, made and built in and upon the said land as in the declaration mentioned, and so kept and continued by the defendants as therein mentioned, in the *bonâ fide* execution of the powers by the said first mentioned act granted, and for the purposes and according to the provisions and restrictions of the same act, the said railway station, wall and embankment having been respectively adjudged requisite, and having been constructed and made by the defendants, under the powers and provisions of the said act, for the purpose of providing a certain station and yard, buildings and conveniences for the purposes of the said undertaking, to wit, at Rotherham aforesaid, at the termination of the said railway there, they the defendants then doing as little damage as might be in that behalf. And this the defendants are ready to verify, &c.

To case by a reversioner against a railway company for entering and making a railway on his land, plea that the owners in fee demised to the plaintiff, with a reservation to the grantors to enter and make ways, &c., and that the defendants made the railway as the servants of the grantors.

See plea, *Durham and Sunderland Railway Company* v. *Walker*, 2 Q. B. Rep. 940; 2 G. & D. 327, S. C.

(s) An owner *pur autre vie* of a common may approve under the statutes 20 Hen. 3, c. 4, and 13 Edw. 1, st. 1, c. 46; *Patrick* v. *Stubbs*, 9 M. & W. 830.

(a) *Turner* v. *Sheffield and Rotherham Railway Company*, 10 M. & W. 426.

11. Other Pleas.

See forms in *Whittaker* v. *Bank of England*, 5 Tyrw. 253.

Pleas by bankers, that they had not cash in hand sufficient to pay check, and therefore did not pay the same.

See forms in *Combe* v. *Capron*, 1 Mood. & Rob. 398.

Plea denying malice and determination of suit in actions for malicious arrest. (*b*)

And for a further plea in this behalf, the defendant says, that he was not nor is he tenant to the plaintiff of the said messuage &c., in manner and form as in the declaration alleged. And of this the defendant puts himself upon the country, &c.

To declaration by landlord against tenant for not cultivating according to the custom of the country, plea that the defendant was not tenant *modo et forma*. (*c*)

See plea, *Bradbee* v. *Christ's Hospital*, 4 M. & G. 720.

To action for continuing a hoarding an unreasonable time erected on a footway, for the purpose of pulling down houses adjoining, plea of license by the Lord Mayor under a custom of the city of London.

See plea, *Mounsey* v. *Dawson*, 6 A. & E. 752.

To declaration for distraining plaintiff's cattle on a farm for rent due to D. for the farm, selling them after a replevin was granted by the sheriff, and paying the proceeds to D., plea that the lord of the manor had the exclusive right to grant replevins except in default, that the lord made no default and that the sheriff had not required him to replevy.

See *Birley* v. *Inhabitants of Hundred of Salford*, 11 M. & W. 391.

Pleas to action against a hundred for felonious demolition.

See *Flight* v. *Thomas*, 2 P. & D. 531.

Plea of prescriptive right to make a nuisance.

And the defendant, by ——, his attorney, says, that the plaintiff ought not further to maintain his action, because the defendant now brings into

Plea of payment of money into Court. (*d*)

(*b*) Where to an action for maliciously and without probable cause procuring a writ of extent at the suit of the queen to be issued against the plaintiff's lands and chattels, alleging that the writ was superseded, the defendant pleaded that although true it is that the execution of the writ of extent was superseded, it was by the grace and favour of the queen granted that the execution of the said writ of extent should be superseded upon the terms that the plaintiff should pay the sheriff's costs relating to the execution, which terms being complied with, the said writ was superseded; the plea was held bad, as it was consistent with it that the writ of extent had been sued out maliciously and without any probable cause; *Craig* v. *Hasell*, 3 G. & D. 299.

(*c*) This plea only puts in issue the fact of the tenancy, and not the holding, subject to a duty to cultivate according to the custom of the country; and the defendant cannot therefore object under this plea, or that of not guilty, that a lease under which the land had been originally taken was not produced by the plaintiff in order to show that it did not exclude the custom; *Hallifax* v. *Chambers*, 4 M. & W. 662.

(*d*) The 3 & 4 W. 4, c. 42, s. 21, enacts that "it shall be lawful for the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel (altered as regards libel by the 6 & 7 Vict. c. 96,) slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) by leave of any of the said superior Courts where such action is pending, or a judge of any of the said superior Courts, to pay into Court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading as the said judges, or such eight or more of them as aforesaid, shall by any rules or orders, by them to be from time to time made, order and direct."

OTHER PLEAS. Court the sum of £——, ready to be paid to the plaintiff; and the defendant further saith, that the plaintiff has not sustained damages to a greater amount than the said sum of £—— in respect of the cause of action in the declaration mentioned. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action thereof.

XII. PLEAS IN BAR IN TROVER.

See Reg. Gen. Hil. T. 4 W. 4, reg. 4, *ante*, vol. i. 530, 755. *In an action for converting the plaintiff's goods, the plea of not guilty operates as a denial of the conversion only, and not of the plaintiff's title to the goods.* The plaintiff is entitled to a verdict on this plea, if on the trial a conversion in fact be proved, although it appear from the evidence that at the time of such conversion the plaintiff had parted with his property in the goods; *Vernon* v. *Shipton*, 2 M. & W. 9; *Barton* v. *Brown*, 5 M. & W. 298; and see the cases referred to, *ante*, vol. i. p. 530, 532.

Reg. Gen. Hil. T. 4 W. 4, as to Pleas in Trover.

Several of the forms of pleas in *Detinue* would also assist in *Trover*, see *ante*, 241 to 245.

The defendant, by ——, his attorney, says, that he is not guilty of the grievances above laid to his charge, or of any or either of them or any part thereof, in manner and form as the plaintiff has above thereof complained against him. And of this the defendant puts himself upon the country, &c.

Plea of not guilty.

And the defendants, by ——, their attorney, say, that they are not, nor is either of them, guilty of the said grievances above laid to their charge, or of any or either of them, or any part thereof, in manner and form as the plaintiffs have above complained against them. And of this the defendants put themselves upon the country, &c.

Plea of not guilty by several defendants.

And for a further plea in this behalf, the defendant says, that the plaintiff was not, at the said time when &c., lawfully possessed as of his own property of the said goods and chattels in the said declaration mentioned, or of

Plea, denial of plaintiff's property. (a)

(a) Assignees of a bankrupt may, under the plea of not possessed, avail themselves of the defence that the bankrupt was the reputed owner of the goods, wherefore they converted them, and a special plea would be bad; *Isaac* v. *Belcher*, 5 M. & W. 139; 7 Dowl. 516. As to the effect of a second bankruptcy under which the bankrupt did not pay fifteen shillings in the pound, see *Benjamin* v. *Belcher*, 11 A. & E. 350; 3 P. & D. 317; and 6 Geo. 4, c. 16, s. 127. In trover against the sheriff and execution creditor for taking goods under an execution, it is not competent for the sheriff under this plea to give in evidence certain facts justifying the seizure, distinguishing his case from that of the other defendants; but such a defence must be specially pleaded; *Samuel* v. *Duke*, 3 M. & W. 622; but where it appeared that, the plaintiff being the legal owner of the goods in question, they were seized while in the actual possession of a third party, under an execution against such third party, and sold to the defendant, it was held that under this plea the defendant might show that the plaintiff authorised the sale; *Pickard* v. *Sears*, 6 A. & E. 469; see also *Gregg* v. *Wells*, 10 A. & E. 90. A lien may be given in evidence under a plea that the plaintiff was not possessed; *Brandao* v. *Barnett*, 1 M. & G. 908; see also *Gregg* v. *Wells*, 10 A. & E. 90.

In Trover.

any or either of them, or any part thereof, in manner and form as he has in the said declaration in that behalf above alleged. And of this the defendant puts himself upon the country, &c.

Plea that the chattel was the property of the defendant.

See a form in Trespass in *Wilton* v. *Edwards*, 6 Car. & P. 677, which may be readily framed in Trover.

Special plea in trover for a bill, stating regular indorsements, by which defendant became lawful holder.

See the forms of pleas in *Fancourt* v. *Bull*, 1 Bing. N. C. 681 ; 1 Hodges, 98. See also *Hilton* v. *Swan*, 5 Bing. N. C. 413; 7 Dowl. 417, S. C.

To trover by husband and wife as administratrix, plea denying the female plaintiff's possession as administratrix.

See *Elliott* v. *Kemp*, 7 M. & W. 306.

By Assignees.

1. By Assignees.

Denial of bankrupt's possession and property in goods.

And for a further plea as to the said [first] count of the said declaration, the defendants say, that the said —— was not before he became bankrupt lawfully possessed, as of his own property, of the said deeds, writings, goods, chattels and effects in the said [first] count mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiffs have above in that behalf alleged. And of this the defendants put themselves upon the country, &c.

Denial of plaintiff's possession and property as assignees. (*b*)

And for a further plea in this behalf to the said [second] count of the declaration, the defendants say, that the plaintiffs, as assignees as aforesaid, were not lawfully possessed as of their property, as assignees as aforesaid, of the said deeds, writings, goods, chattels and effects in the said [second] count mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiffs have above in that count alleged. And of this the defendants also put themselves upon the country, &c.

Denying the right to sue as assignee. (*c*)

And for a further plea in this behalf, the defendant says, that the plaintiffs were not nor are assignees of the estate and effects of the said E. F., in manner and form as by the said declaration is alleged. And of this the defendant puts himself upon the country, &c.

(*b*) See forms in *Scott* v. *Thomas*, 6 Car. & P. 611, in notes; and in *Samuel* v. *Morris*, *id.* 620; and Petersdorff Prec. 63. The assignee of an insolvent debtor, on his acceptance of the appointment, has vested in him all the estate of the insolvent from the date of the vesting order; *Yorke* v. *Brown*, 10 M. & W. 78; 2 Dowl. N. S. 283, S. C.

(*c*) See forms in *Scott* v. *Thomas*, 6 Car. & P. 611, in note (*a*); and Petersdorff, 63. See the necessity for this traverse, Reg. Gen. Hil. T. 4 W. 4, reg. 21, *ante*, vol. i. 754, 755. This plea puts in issue the petitioning creditor's debt and the act of bankruptcy; *Butler* v. *Hobson*, 4 Bing. N. C. 290; 6 Dowl. 409, S. C.; *Buckton* v. *Frost*, 1 P. & D. 102. Sometimes also a notice in writing of the defendant's intention to dispute the trading, petitioning creditor's debt, act of bankruptcy, as required by 6 Geo. 4, c. 16, s. 90, may be necessary or advisable; see *ante*.

Plea in trover by assignees, that bankrupt was indebted to defendant, and that it was agreed between them that defendant should retain the plates and copper as a security and lien for said debt.(*d*)

And for a further plea in this behalf, as to the said alleged grievances in the said declaration mentioned, as to the said plates and copper, the defendant says, that heretofore and before the said E. F. became a bankrupt, and before the said time when &c., to wit, on &c., he was indebted to the defendant in a certain sum of money, to wit, the sum of £——, for money lent and advanced by the defendant to the said E. F. and for interest thereon; and the said E. F. had indorsed and delivered to the defendant for value, a certain bill of exchange drawn by the said E. F. upon and accepted by Y. Z. for the payment of £——, and to become due heretofore, to wit, on &c.; and the defendant then had in his custody and possession, by and with the consent of the said E. F. the said plates and copper, and it was then, and before the said E. F. became a bankrupt, agreed by and between the said E. F. and the defendant, that in consideration thereof the said plates and copper in the said declaration mentioned, should be placed and remain in the defendant's custody and possession as a security, and that the defendant should have a lien thereon for the re-payment of the said debt so due and owing from the said E. F. to the defendant, and for the payment of the said bill of exchange, that the defendant should hold and retain the said plates and copper till the said debt and the said bill for £—— should be paid. And the defendant further saith, that afterwards, and before the said E. F. became a bankrupt, and before the said time when, &c., to wit, on &c. last aforesaid, the said ——, in pursuance of such agreement, did place and suffer to remain in the defendant's custody the said plates and copper as such security, and give him such lien thereon. And the defendant further saith, that the said debt and bill of exchange, or either of them, have not nor hath not at any time been paid to the defendant, and the same are still due, in arrear and unpaid to him, for which reason and as such security and lien, he the defendant, before and at the said time when &c., kept and detained and still keeps and detains the said plates and copper as he lawfully might for the cause aforesaid, and which is the alleged conversion and disposal of the said plates and copper in the said declaration mentioned to the defendant's use. And this the defendant is ready to verify, &c.

Plea, that bankrupt employed defendant to do work in printing upon paper, and that defendant did such work and retains the pictures, &c. as a lien and security for the price of his work.

And for a further plea in this behalf, as to the said alleged grievances in the said declaration mentioned, as to the said pictures, impressions, prints and paper, the defendant says, that the said E. F., before he became bankrupt, and before the said time when &c. to wit, on &c. and on divers other days and times aforesaid, retained and employed the defendant to bestow his work and labour, to impress and print divers etchings, pictures, impressions and prints upon paper for the said E. F., for hire and reward to the defendant in that behalf, and thereupon the defendant afterwards and before the said E. F. became a bankrupt, and before the said time when &c. to wit, on &c. last aforesaid, and on the said other days and times, did, under and by

(*d*) Lien is not admissible under the plea of not guilty in trover, *White* v. *Teale*, 12 A. & E. 106; 4 P. & D. 43; but may be given in evidence under a plea of not possessed; *Owen* v. *Knight*, 4 Bing. N. C. 54. See, however, observations on these cases by the Court of Exchequer in *Mason* v. *Farnell*, 1 Dowl. & L. 580. When the assignees of a bankrupt declare on the possession of the bankrupt before his bankruptcy, and a conversion after the bankruptcy, these special pleas, justifying under a contract with the bankrupt, seems proper. As to the right of lien in the owners of a ship against the assignees of a bankrupt charterer, see *Belcher* v. *Capper*, 4 M. & G. 502.

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virtue of the said retainer and employment, bestow his work and labour, and impress and print upon paper and otherwise, divers, to wit, —— etchings, —— pictures, —— impressions, and —— prints, upon divers, to wit, —— reams of paper and otherwise, being the same identical etchings, pictures, impressions, prints and paper in the said declaration mentioned, and thereupon the said E. F. then became and was indebted to the defendant for and in respect of his said work and labour, and the said etching, drawing, impressing and printing, in a large sum of money, to wit, amounting to £——, and the said etchings, pictures, impressions, prints and paper, having at all times remained and continued in the custody and possession of the defendant, and the said debt remaining due and unpaid (*e*); wherefore the defendant, before and at the time when &c. did detain and still doth detain the said etchings, pictures, impressions, prints and papers, as *a security and lien* for the said debt, and which is the said alleged conversion and disposal thereof to his own use as in the said declaration mentioned. And this the defendant is ready to verify, &c.

Plea nearly similar to last. (*f*)

And for a further plea in this behalf, the defendant says, that heretofore, and before the said A. B. became a bankrupt, to wit, on the —— day of ——, A. D. ——, a large sum of money, to wit, the sum of £——, was due and owing from the said A. B. to the defendant, and the same being so due and owing, it was agreed then between the said A. B. and the defendant, that in consideration thereof the said A. B. should deposit with the defendant the said deed, goods and chattels in the declaration mentioned, as a security for the repayment of the said sum of £——, with interest thereon, by the said A. B. to the defendant, and that the defendant should hold and retain the said deed, goods and chattels, until the said sum of £—— and interest should be so repaid. And the defendant further says, that before the said A. B. became bankrupt, to wit, on the day and year aforesaid, the said A. B., in pursuance of such agreement, did deposit with the defendant the said deed, goods and chattels for the purpose aforesaid. And the defendant further says, that the said sum of £—— hath not at any time been repaid to the defendant, but the same with interest hath been from thence hitherto forborne by the defendant, and the same is wholly due and unpaid to him, for which reason he the defendant hath from thence hitherto detained and refused to give up, and still detains and refuses to give up the said deed, goods and chattels as he lawfully might, for the cause aforesaid, which is the supposed conversion in the declaration mentioned. And this the defendant is ready to verify, &c.

Plea, that bankrupt, before his bankruptcy, in consideration of a debt due from him to defendant, duly assigned his property in the goods to the defendant.

And for a further plea, as to the goods, chattels and effects in the said first count mentioned, the defendants say, that heretofore and before he the said —— became bankrupt, and before the said time when &c. in the said first count mentioned, the said —— for a bonâ fide good, valuable and sufficient consideration, to wit, the sum of £—— theretofore lent and advanced, and then paid by the defendant —— to and for the said ——, duly assigned to

(*e*) *Quære*, whether it should not have been here averred that the defendant, by the custom of trade or otherwise, *had a lien* upon said articles before the bankruptcy.

(*f*) See *Wright* v. *Fearnley*, 5 Bing. N. C. 89.

the said —— all his estate, right, title, interest and property of, in and to the said goods, chattels and effects in the introductory part of this plea mentioned, wherefore the defendant ——, in his own right, and the said other defendant as his servant and by his command, committed the said alleged grievances in the first count mentioned as to the said goods, chattels and effects. And this they the defendants are ready to verify, &c.

Plea, that bankrupt, before his bankruptcy, deposited the goods in defendant's hands as a security or lien for a debt.

And for a further plea in this behalf to the said first count of the said declaration, the defendants say, that heretofore and before the said —— became a bankrupt, and whilst he was possessed of the said deeds, writings, goods, chattels and effects in the said first count mentioned, to wit, on the —— day of ——, A. D. ——, a large sum of money, to wit, the sum of £5000, was due and owing from the said —— to the said ——, and in consideration thereof the said —— then deposited the said deeds, writings, goods, chattels and effects in the said first count mentioned, as a security for the repayment of the said money so due and owing as aforesaid; and upon the terms and agreement, among others, that the said —— should hold and detain the same till that money had been repaid; and the defendant further saith, that the said debt hath not been repaid, but is still due, unpaid and unsatisfied, and therefore the said —— in his own right, and the said other defendant as his servant, and by his command, afterwards and at the said time when &c. did refuse to deliver the same to the said ——, and thereby committed the said alleged grievance in the said first count mentioned, which are the same supposed grievances in the said first count mentioned, and whereof the plaintiffs have above thereof complained against them. And this they are ready to verify, &c.

Plea to a declaration in trover at the suit of assignees to the first count, on the bankrupt's possession, that the defendant agreed to advance to bankrupt, at different times, divers sums of money on the deposit of goods mentioned in declaration, and that defendant retains same as a security for the repayment thereof.

And for a further plea in this behalf, as to the said first count of the said declaration, the defendant says, that whilst the said S. T. was so possessed of the said goods and chattels as in that count mentioned, to wit, on the —— day of ——, in the year of our Lord 18—, and on divers other days and times afterwards, the said S. T. requested the defendant to lend and advance him at each of those times a sum of money, amounting in the whole to a large sum, to wit, £——, and at each of those times offered the defendant as a security for the repayment of the sum to be so lent and advanced, and interest thereon, to deposit with the defendant a portion of the said goods and chattels in the said first count mentioned, amounting in the whole of such times to the said goods and chattels in the said first count mentioned, and that the defendant should hold and retain such portion until the sum so to be lent and advanced on the occasion and interest thereon should be repaid; and thereupon the defendant then on those occasions respectively assented and agreed with the said S. T. to make those loans and advances on having such portions respectively of the said goods and chattels, amounting in the whole to the said goods and chattels in the said first count mentioned, so deposited with the defendant as such security for the repayment thereof respectively, and interest thereon, on the terms that he might hold the same portions respectively as such security for the repayment of the said loans and advances respectively and interest; and the said S. T. then, on each of the said occasions agreed with the defendant to borrow of him, and the defendant then agreed with the said S. T. to lend to him the said sums,

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amounting in the whole to the said sum of £——, on those terms, and the said S. T. then agreed with the defendant to make the said deposits, and to permit the defendant to hold the said portions of the said goods and chattels respectively as such security as aforesaid for the repayment of the said loans and advances respectively and interest thereon, and thereupon and whilst the said S. T. was so possessed of the said goods and chattels in the said first count mentioned, to wit, on the said —— day of ——, in the year of our Lord 18—, and on the said other days and times afterwards, the defendant accordingly, and in pursuance of the said agreement, lent and advanced to the said S. T. divers sums, amounting in the whole, to wit, to £——, on the terms aforesaid, and in consideration thereof, and in pursuance of the said agreement, and as a security to the defendant for the repayment of those loans and advances respectively and interest thereon, the said S. T. then deposited with the defendant divers portions of the said goods and chattels in the said first count mentioned, amounting in the whole to the said goods and chattels in that count mentioned, and then agreed with the defendant, and the defendant then agreed with the said S. T., that the defendant should hold and retain the said portions of the said goods and chattels respectively as a security for the repayment to the defendant of the said sums respectively so lent and advanced and interest thereon.* And the defendant further says, that the said sums so lent and advanced by him as aforesaid have not nor hath any of them, or any part thereof, at any time hitherto been paid unto the defendant, and the same are still wholly due and unpaid to him, for which cause, and no other, he the defendant hath hitherto held and detained and still holds and detains the said goods and chattels in the said first count mentioned, as he lawfully might for the cause aforesaid, and which is the supposed conversion to his own use of the said goods and chattels and the said grievances in the said first count mentioned. And this the defendant is ready to verify, &c.

The like to count on assignees' possession, except as to, &c. that money was advanced on goods before defendant had notice of any act of bankruptcy. (*g*)

And for a further plea in this behalf, as to the [second] count of the said declaration, the defendant says, that before the date and issuing forth of the fiat under which the said S. T. was adjudged and declared a bankrupt as aforesaid, to wit, on the —— day of ——, in the year of our Lord ——, and on divers other days and times afterwards, the said S. T. requested the defendant [*as in the preceding plea, inserting at the asterisk as follows:*] and the defendant in fact further saith, that the said loans and advances and payments, deposits and agreements, respectively were really and *bonâ fide* made and entered into on the terms aforesaid, and that the same were respectively so made and entered into and took place before the date and suing forth of the said fiat, and the defendant avers, that at the times of making the said loans and advances and payments, deposits and agreements, or any or either of them respectively as aforesaid, he the defendant had not notice of any act of bankruptcy by the said S. T. committed. [*Conclude as in preceding plea from the asterisk.*

Plea as to converting a lease, that the bank-

And for a further plea in this behalf, as to the said [first] count of the said declaration, so far as the same relates to the defendants' converting and

(*g*) See 2 & 3 Vic. c. 29; *Pearson* v. *Rogers*, 1 P. & D. 302.

disposing to their own use of the said indenture of lease therein first above mentioned, the defendants say, that before the said —— —— the younger, became a bankrupt, and before the said time when &c. in the said first count mentioned, to wit, on the —— day of —— A. D. ——, he the said —— —— delivered to and deposited with one —— —— the said last mentioned indenture of lease, to be by him kept as a pledge and security for and until the payment of a certain large sum of money, to wit, the sum of £—— then due and owing from the said —— —— to the said —— ——; and thereupon the said sum of money remaining and being wholly unpaid, the defendants, as the servants of the said —— ——, and by his command, did refuse to deliver the same, and the said —— ——, and thereby committed the said alleged grievance in the said first count mentioned as to the said indenture. And this the defendants are ready to verify; wherefore they pray judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

rupt deposited lease with one G. H. as a security for a debt, and therefore defendant detained said lease as servant of G. H.

And for a further plea in this behalf as to so much of the first count of the said declaration as relates to the said indenture of lease therein first mentioned, the defendants say, that before the said —— —— became a bankrupt as aforesaid, and whilst he was possessed of the said indenture of lease as his property, and whilst the term therein mentioned and demised was legally vested in him, to wit, on the —— day of —— A. D. ——, the said —— ——, by the consideration and judgment of the Court of our lady the queen, before the queen herself, recovered against one —— —— and the said —— ——, as well a certain debt of £—— as also £——, which in and by the said Court were then adjudged to the said —— —— for his damages which he had sustained as well by reason of the detention of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the said —— —— and —— —— were convicted. And the defendants further say, that afterwards and before the said —— —— became a bankrupt as aforesaid, to wit, on the said —— day of —— A. D. ——, the said —— ——, for obtaining satisfaction of the said debt and damages sued and prosecuted out of the said Court a certain writ of our lady the queen, called a writ of *fieri facias*, directed to the Sheriff of Surrey, whereby the said sheriff was commanded that of the goods and chattels of the said —— —— and —— —— in his the said sheriff's bailiwick, he should cause to be levied the debt and damages aforesaid; which said writ was afterwards and before the delivery thereof to the said sheriff, indorsed to levy £—— besides sheriff's poundage, &c. and which said writ,

Plea that the bankrupt before his bankruptcy was possessed of the indenture of lease and the term, and that Y. Z. recovered a judgment against bankrupt, and issued a *fi. fa.* under which the sheriff seized the lease and term, and assigned the same to Y. Z., and defendant as his servant converted such lease. (*h*)

(*h*) See a justification under a *fieri facias*, 1 Bing. N. C. 721; and see *Legg* v. *Evans*, 6 M. & W. 36. See pleas by sheriff of seizure under *fi. fa.*, *Whitmore* v. *Robertson*, 8 M. & W. 463; *Rawdon* v. *Wentworth*, 10 M. & W. 36; 2 Dowl. N. S. 287, S. C.; *Cheston* v. *Gibbs*, 12 M. & W. 111; 1 D. & L. 420, S. C. As to when this defence may be given in evidence under pleas of "not guilty" or "not possessed," see *Unwin* v. *St. Quintin*, 11 M. & W. 277; *Turquand* v. *Hawtrey*, 9 M. & W. 727. The sale, and not the demand and refusal, constitutes the conversion; *Edwards* v. *Hooper*, 11 M. & W. 363. Although the goods of a debtor are bound from the delivery of a writ of execution to the sheriff, yet the property in them is not changed by it, and is still in the debtor, and he may sell them, subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser, unless the sale took place in market overt; *Samuel* v. *Duke*, 3 M. & W. 622.

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Plea as to converting lease, that bankrupt, before his bankruptcy, by indenture assigned same to Y. Z., and defendants as his servants converted same.

And for a further plea in this behalf, as to so much of the said [first] count of the said declaration as relates to the said indenture of lease therein first mentioned, the defendants say, that before the said —— —— became a bankrupt, and whilst he was possessed of the said indenture of lease as his property, and whilst the term therein mentioned and thereby demised was legally vested in him, to wit, on the —— day of ——, A. D. ——, by a certain indenture then made between —— —— of the one part, and the said —— —— of the other part, which said indenture was sealed with the seal of the said —— ——, he the said —— —— did bargain, sell, assign, transfer, and set over unto the said —— —— (amongst other things) the said indenture of lease in the said first count mentioned, and all his estate and interest therein and in the term thereby granted and demised, to have and to hold the same unto the said —— ——, wherefore the defendants, as the servants of the said —— ——, and by his command, committed the alleged grievances in the introductory part of this plea mentioned as to the indenture. And this they the defendants are ready to verify, &c.

To trover by assignees of bankrupts for a conversion after bankruptcy, plea that the goods were purchased and paid for by S. as agent for the bankrupts, and they becoming insolvent, and the goods coming to the hands of the defendants as owners of the vessel on board of which they were shipped, the defendants by order of S. stopped them in transitu. (*i*)

See *Brancker* v. *Molyneux*, 1 M. & G. 710.

To trover by the assignees of an insolvent, alleging a con-

And for a further plea in this behalf, the defendant says, that by a certain indenture made heretofore, and whilst the said E. W. was possessed as aforesaid of the goods in the declaration mentioned, and before he subscribed

(*i*) See plea of stoppage in transitu, *Wilmshurst* v. *Bowker*, 5 Bing. N. C. 541; but the facts stated in that plea would have been put in issue by a plea denying the plaintiff's possession; and see *Whitehead* v. *Anderson*, 9 M. & W. 518, where, in an action by assignees of a bankrupt for a conversion after bankruptcy, it was agreed that all points as to the right of stoppage in transitu should be raised upon the pleas of "not guilty" and "not possessed."

his petition as in the declaration mentioned, and before the commencement of his imprisonment, to wit, on the —— day of ——, 18—, between the said E. W. of the one part, and one G. L. of the other part, which said indenture, &c. [*profert*], after reciting that the said E. W. had requested the said G. L. to discount for him a certain bill of exchange, bearing even date with the said indenture, drawn by the said G. L. upon and accepted by the said E. W. for payment of £100 at one month after date, which the said G. L. had agreed to do upon having the payment of the said bill secured to him in the manner thereinafter mentioned, the said E. W. in consideration of the sum of £100 paid by the said G. L. to the said E. W., did grant, bargain, sell and confirm unto the said G. L. his executors, administrators and assigns, the goods in the declaration mentioned, to have and to hold the said goods thenceforth unto the said G. L. his executors, administrators and assigns, subject nevertheless to the proviso thereinafter contained; and by the said proviso it was provided that if the said E. W. his executors, administrators and assigns, or any of them, should pay the said bill of exchange when the same should become payable, then the indenture should determine and be void to all intents and purposes. And the said E. W. by the said indenture, for himself, his executors, administrators and assigns, did covenant and grant with and to the said G. L. his executors, administrators and assigns, in manner following: that he, his executors or administrators, would pay the said bill of exchange at the time and in manner aforesaid, and that in case default should happen to be made in payment thereof, the said G. L. his executors, administrators and assigns, should and might peaceably and quietly have, receive and enjoy, to his and their own proper and absolute use and behoof for ever, the said thereby bargained and sold goods, without any lawful let, suit, trouble, molestation or denial of the said E. W. his executors, administrators or assigns, or any other person or persons whomsoever, as by the said indenture, reference being thereunto had, will more fully and at large appear. And the defendant further says, that the bill of exchange in the said indenture mentioned, became due before the said E. W. subscribed his petition as aforesaid, and before the commencement of his imprisonment, and before the plaintiffs became assignees as aforesaid, to wit, on the —— day of ——, 18—, and that the said E. W. did not pay the said bill of exchange when the same became payable, but wholly refused and neglected so to do, and therein wholly failed. And thereupon the said G. L. afterwards, and before the said E. W. subscribed his said petition, and before the commencement of his imprisonment, and before the plaintiffs became assignees as aforesaid, to wit, on the day and year last aforesaid, entered into the possession of and took and had the goods to his own use, under and by virtue of the said indenture, whereupon

version after the insolvency, plea that the defendant had discounted a bill of exchange, and that to secure payment of the bill the insolvent executed a bill of sale of the goods in question, by which he covenanted that in default of payment the defendant should have the goods as his absolute property, and averring default in payment. (*k*)

(*k*) This plea is good, as by the terms of the bill of sale the defendant had become absolute owner of the goods on the insolvent's failure to pay the bill of exchange before the imprisonment had been made by virtue of such ownership, and not of the bill of sale, and therefore the plaintiff could not reply a *sale after* the insolvent's imprisonment had commenced, under the 1 & 2 Vic. c. 110, s. 61, which enacts that no person shall after the commencement of the imprisonment of the insolvent "avail himself" of any bill of sale given by the insolvent, "either by seizure and sale of the property of such prisoner, or by sale of such property theretofore seized;" *Hunt* v. *Robins*, 2 G. & D. 646; 3 Q. B. Rep. 300, S. C.

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the defendant, as the servant and by the command of the said G. L. after such default as aforesaid, to wit, at the said time when &c. converted and disposed of the goods in the declaration mentioned. And this the defendant is ready to verify, &c.

At the Suit of Executors, &c.

Plea (to a declaration in trover, at suit of administrator, where administration was granted by bishop of C.) that intestate had *bonâ notabilia* in divers dioceses, and so the administration void, because it should have been granted by archbishop. (*l*)

2. At the Suit of Executors, &c.

And for a further plea in this behalf, the defendant says, that the diocese of Chester is, and at the time of the death of the said L. was, within the province of York, and that the said diocese of Carlisle is, and at the time of the death of the said L. and at the time of the granting of the said letters of administration was, within the same province of York, and that the said L. at the time of his death was an inhabitant of and commorant at the parish of K. in the county of Westmoreland, and within the diocese of the bishop of Carlisle; and the defendant further says, that the said L. in his lifetime, and at the time of his death, had divers goods and chattels, rights and credits, which were *bonâ notabilia* in the several dioceses of the bishop of Carlisle and of the bishop of Chester, within the said province of York, that is to say, goods and chattels to the value of £—— and upwards within the said diocese of the bishop of Carlisle, to wit, at the parish of K., and also other goods and chattels to the value of £—— and upwards within the said diocese of the bishop of Chester, to wit, at and in the said county of Westmoreland; by reason whereof the said letters of administration then were and are void and of no effect in law. And this the defendant is ready to verify, &c.

Other Pleas.

Plea to trover for wine, that plaintiff had no property in the wine, except as afterwards stated, and that Y. Z. being the owner of the wine, employed defendant as their auctioneer to sell upon certain conditions,

3. Other Pleas.

And for a further plea in this behalf, the defendant saith, that the plaintiffs were not possessed of or entitled to or interested in the said goods and chattels otherwise than is hereafter in this plea mentioned, and that before the plaintiffs had any property or interest in the said goods and chattels in the said declaration mentioned, to wit, on the 21st day of January, A.D. 1835, T. S. and R. S. were lawfully possessed of the said goods and chattels as of their own property, and the said T. S. and R. S. then retained and employed the defendant, as their auctioneer and agent in that behalf, to sell and dispose of the said goods and chattels upon certain terms and conditions, and amongst others, that each purchaser should pay down immediately £25 per cent. on

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(*l*) See other pleas by or against executors, *ante*, 127, &c. See also *Whyte* v. *Rose*, 2 G. & D. 312. As to the plea of *bonâ notabilia* in general, see 1 Saund. 274, n. 3; Bac. Abr. Executors.

If the defendant says that the administration was void, because he did not reside within the diocese at the time of intestate's death, he should plead it specially; 5 B. & C. 93.

If the other diocese, in which the intestate had *bonâ notabilia*, was in a different province, the diocesan has power to grant administration; but where an intestate has *bonâ notabilia* in two dioceses, within the same province, neither diocesan has power to grant such administration, but it must be done by the metropolitan of the province; 5 B. & C. 493; 8 D. & R. 247, S.C.

and *inter alia*, that unless purchaser paid the residue of price within a certain time, defendant should be at liberty to re-sell. That plaintiff became purchaser, but did not pay in time, and therefore defendant re-sold the wine, which was the conversion complained of. (m)

the amount of his purchase as a deposit, that the lots should be taken away with all faults and errors of description, at the buyer's expense, within three days after the sale, and the remainder of the purchase-money paid in cash, or from buyers of £50 and upwards in bills approved, to wit, bills payable three months after the date thereof, by the auctioneer, to wit, the defendant, adding interest at £5 per cent. per annum, on or before the delivery, and that upon failure of complying with the said conditions, the deposit-money should be forfeited, the lots re-sold by public or private sale without giving notice thereof, and the deficiency, if any, attending such re-sale, together with the expenses attending the same, should be made good by the defaulters at the said sale. And thereupon the defendant, as such auctioneer and agent, afterwards, to wit, on the day and year last aforesaid, put up and exposed the said goods and chattels in the said declaration, amongst others, for sale by auction in divers lots, at and upon the terms and conditions aforesaid, amongst others, and thereupon the plaintiffs then became the purchasers of the said goods and chattels in divers lots upon the said terms and conditions, and for divers sums of money, to wit, the sum of £93 : 3*s.*; and thereupon the plaintiffs then paid to the defendant, as such auctioneer and agent as aforesaid, a certain sum of money, to wit, the sum of £20 : 19*s.* as and for and on account of such deposit as aforesaid; and although the defendant was then and continually afterwards until the re-sale of the said goods and chattels as hereinafter mentioned ready and willing to accept and receive payment of the remainder of the said purchase-money, and to deliver the said goods and chattels to the plaintiffs in pursuance of the said terms and conditions, and whereof the plaintiffs always have had notice; yet the plaintiffs did not nor would within three days after the said sale and their said purchase pay the remainder of the said purchase-money either in cash or by such bill or bills as aforesaid, but wholly neglected and refused so to do. And thereupon the defendant, as such auctioneer and agent as aforesaid, and at and according to the request of the said T. S. and R. S. under and by virtue and in pursuance of the said terms and conditions of sale, after the expiration of the said three days, to wit, on the 10th day of April, in the year aforesaid, did re-sell the said goods and chattels by public auction and sale to divers persons, to wit, certain other persons of the names of S. R., L. and William Dickeson, and did then deliver the said goods and chattels to such last-mentioned purchasers thereof, and which was and is the said conversion in the said declaration mentioned, and whereof the plaintiffs have above complained. And this the defendant is ready to verify, &c.

(m) To trover for two receipts, the defendants pleaded that before and at the time when &c. the defendants were lawfully possessed as of their own property of the same receipts, and that being so possessed, the defendants, and before the said time when &c., delivered the same to one J. D. to be kept by him to and for the use of the defendant, and that J. D. afterwards, and before the said time when &c., delivered the same to the plaintiff, and that afterwards, and before the said time when &c., the plaintiff casually lost the same out of his possession, and the same by finding came to the possession of the defendants; and that the defendants afterwards refused, upon the request of the plaintiff, to deliver the same to the plaintiff, as they lawfully might for the cause aforesaid, which is the same conversion of which the plaintiff has complained; and it was held that the plea was bad for duplicity, and for not confessing a conversion, but that it gave sufficient colour to get rid of the objection that it amounted to the general issue; *Acraman* v. *Cooper*, 10 M. & W. 585.

OTHER PLEAS.

Distress damage feasant to trover for deer. (*n*)

And for a further plea in this behalf, as to the said conversion of one of the said reclaimed deer in the declaration mentioned, the defendant says, that he the said defendant, before and at the time when &c., was possessed of a certain close, situate and being at K. in the county of S. aforesaid, and because the last-mentioned deer, before and at the said time when &c., was wrongfully in the said close of the defendant, doing damage there to the said defendant; he the said defendant, at the said time when &c., seized and took the last-mentioned deer in the said close of the defendant so doing damage therein as aforeaaid, as a distress for the said damage so there done and doing by the said deer as aforesaid; which said seizing and taking is the same conversion whereof the plaintiff has above complained. And this the defendant is ready to verify, &c.

(*n*) If the conversion relied on by the plaintiff was not the seizure, but a subsequent abuse of the distress, it seems he must show it in reply to the plea; *Weeding* v. *Aldrich*, 9 A. & E. 861; 1 P. & D. 657, S. C.

XIII. PLEAS, AVOWRIES, AND COGNIZANCES IN REPLEVIN.(a)

1. In General.

In General, *Non cepit.* (b)

In the Queen's Bench [*or* "C. P." *or* "Exchequer."]

The —— day of ——, A.D. ——.

D. ats. B. } And the defendant, by E. F. his attorney, says, that he did not take the said [cattle, goods and chattels] of the plaintiff in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant puts himself upon the country, &c.

Commencement of an avowry.(c)

In the Queen's Bench [*or* "C. P." *or* "Exchequer."]

The —— day of ——, A.D. ——.

D. ats. B. } And the defendant, by E. F. his attorney, well avows the taking of the said [goods and chattels (d)] in the said declaration mentioned, in the said [dwelling-house (e)] in which &c. and justly &c. because he says, that &c. [*Here follows the subject-matter of the avowry.*

Commencement of a cognizance. (f)

D. ats. B. } And the defendant, by E. F. his attorney, as the bailiff of G. H. well acknowledges the taking of the said [goods and chattels (g)] in the said declaration mentioned, in the said [dwelling-house (h)]

(a) As to avowries in general, see vol. i. Index, "*Replevin.*"

(b) When the defendant has not in fact taken the goods or cattle, as in the case of a pound-keeper, who has merely received them into the pound, Cowp. 476, or where the place of taking the cattle is mistaken, and the defendant never had the cattle in the place named in the declaration, this plea is sufficient, and the plaintiff will be nonsuited thereon; 1 Saund. 347, note 1. But the defendant cannot have a return of the goods under this plea, and therefore, in order to have a return, he must plead that he took the goods in some other place, describing it, and traverse the place laid in the declaration, and in order to have a return, avow or make cognizance, stating the case for which he distrained; 1 Saund. 347, note 1. See the forms, *post*, 293.

(c) As to an avowry in general, see *ante*, vol. i. Index, "*Replevin*;" Com. Dig. Pleader, 3 K. 13, 14, 15, 17, &c. and 1 Saund. 347, &c.

(d) If the declaration mention the taking to have been of other things, as cattle, &c. then let this agree therewith.

(e) If the declaration mention any other place let this agree therewith.

(f) The term "*cognizance*" imports a justification of the taking in the right of another. The words "as bailiff of, &c." are material, and if one avow and the other make cognizance, without saying as bailiff of the avowant, and entire damages be given, it is said it will be error; Yelv. 108; Com. Dig. Pleader,

IN GENERAL. in which &c., and justly &c., because he says, that &c. [*Here follows the subject-matter of the cognizance.*

Commencement of an avowry by one, and of a cognizance by another.

D. & F. ats. B. } And the said C. D. and E. F. by G. H. their attorney, come and defend the wrong and injury, when &c. and the said C. D. in his own right well avows, and the said E. F. as bailiff of the said C. D. well acknowledges the taking of the said [goods and chattels (*g*)] in the said declaration mentioned, in the said [dwelling-house (*h*)] in which &c. and justly &c. because they say, that &c. [*Here follows the subject-matter of the avowry and cognizance.*

Commencement of a second avowry or cognizance. (*i*)

And the said C. D. further in his own right well avows, and the said E. F. as bailiff of the said —— further well acknowledges the taking of the said [cattle, goods and chattels] in the said declaration mentioned, in the said [dwelling-house and farm] in which &c. and justly &c. because &c.

Conclusion of an avowry or cognizance. (*k*)

And this the defendant is ready to verify; wherefore he prays judgment and a return of the said [goods and chattels] together with his damages, &c. (*l*) according to the form of the statute in such case made and provided, to be adjudged to him, &c.

Plea in bar, property in defendant or a stranger. (*m*)

And for a further plea in this behalf, the defendant says, that the said [cattle, goods, chattels and growing crops] in the said declaration mentioned, at the said time, when &c., were the property of the defendant [*or* " of one E. F."] and not of the plaintiff, as by the said declaration is above alleged. And this the defendant is ready to verify; wherefore he prays a return of the said [goods and chattels] together with his costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

The like in another form.

And for a further plea in this behalf, the defendant saith, that the said cattle, goods and chattels, at the said time when &c., were the property of one C. J. and not of the plaintiff, as by the said declaration is above alleged. And this the defendant is ready to verify; wherefore he prays a return of

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2 K. 14. The words, " as bailiff of E. F." without showing the defendant's authority, are sufficient in all cases, 1 Saund. 347, note 4; and if the defendant says " well avows," instead of "*well acknowledges*," it is sufficient, though not technically correct; Cro. Jac. 373. In replevin the acting as bailiff may be traversed; 1 Saund. 347 c, note 4.

(*g*) Let this agree with the things mentioned in the declaration.

(*h*) Let this agree with the premises stated in the declaration.

(*i*) See another form, Boote's Suit at Law, 239.

(*k*) See form, Morg. 591. It is usual to conclude an avowry, or cognizance, with a verification; see precedents, 1 Saund. 347; Boote, 230, 240. But these being in the nature of a declaration need not be averred, Co. Lit. 303 a; Plowd. 145, 163; *Attwood* v. *Taylor*, 1 M. & G. 288, note (*a*); and it is said to be the best way to conclude each, after showing the cause of the caption, without any averment or further conclusion; 1 Saund. 347. The stat. 7 Hen. 8, c. 4, s. 3, and 21 Hen. 8, c. 19, s. 3, in case any avowry or cognizance for rents, &c. or for damage feasant, be found for the defendant, or if the plaintiff be nonsuit or otherwise barred, enact, that the defendant recover his damages and costs, the conclusion of the avowry therefore alludes to these statutes.

(*l*) See the former note; the " &c." means "costs and charges by him about his defence in this behalf expended;" 1 Saund. 347.

(*m*) As to the mode of pleading property, see Bul. N. P. 54; Lil. Ent. 358; 2 Rich. C. P. 7.

Plea in bar to avowry for rent, agreement to take a note in satisfaction of the rent, and law; *Davis* v. *Gyde*, 4 Nev. & Man. 462; 2 Adol. & El. 623.

the said cattle, goods and chattels, together with his costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

Cepit in alio loco, with avowry for return. (*n*)

And for a further plea in this behalf, the defendant says, that he took the said cattle in the said declaration mentioned, in a certain close called the ——, in the parish of —— aforesaid, in the county aforesaid, without this, that he took the said cattle, or any or either of them, in the said place called the ——, in the said parish of ——, in the county aforesaid, as the plaintiff hath in his said declaration in that behalf alleged. And this he the defendant is ready to verify, &c. And for having a return of the said cattle, the defendant well avows taking of the said cattle in the said declaration mentioned, in the said close called ——, (*o*) and justly, &c. Because he saith, that (*p*) before the said time when &c., and at the time of the making the demise hereinafter mentioned, one E. F. was seised of and in the said close called the —— in which &c., with the appurtenances, in his demesne as of fee, to wit, in the parish aforesaid; and being so seised, he the said E. F., before the said time when &c., to wit, on &c., A. D.—— aforesaid, in the parish aforesaid, in the county aforesaid, demised the said close called ——, in which &c. with the appurtenances, amongst other things, to the defendant, to have and to hold the same to the defendant for the term of —— years thence next ensuing and fully to be complete and ended; by virtue of which said demise, he the defendant afterwards, and before the said time when &c., to wit, on the day and year last aforesaid, entered into the said close called the ——, in which &c., with the appurtenances, and became, and until and at the said time when &c., was lawfully possessed thereof; and because the said cattle in the said declaration mentioned, at the said time when &c., were wrongfully and injuriously in the said close called ——, and treading down and depasturing the grass and herbage there then growing, and doing damage there to the defendant, he the defendant well avows the taking of the said cattle in the said close called ——, and justly, &c., as for and in the name of a distress for the said damage so there done and doing as aforesaid. (*q*)

Plea admitting that the defendant *had* the cattle in the *locus in quo*, but *took* them damage feasant in another close. (*r*)

And the defendant, by E. F. his attorney, well avows the taking and having the said [mare] in the said declaration mentioned, in the said piece or parcel of land called ——, as in the said declaration mentioned, and justly &c., because he says, that &c. [*Here state a seisin in fee of another close in*

(*n*) See the note to the plea of *non cepit*, *ante*, 291, and the precedents, Willes, 475; Rast. Ent. 554, 555; Clift. Ent. 636; Tidd's forms, 598, 4th ed. 690. The avowry being only in the nature of a suggestion to entitle the defendant to a return of the cattle, &c., the plaintiff cannot traverse it, but must either take issue on the traverse of the place, or amend his declaration; 1 Saund. 347, note 1; Willes, 475; 2 B. & P. 482.

(*o*) The close first mentioned in the avowry.

(*p*) The avowry or cognizance is to be according to the fact, and may be for rent, &c., as in the forms, *post*, 295. See Willes, 475.

(*q*) This conclusion, without a verification, is proper; 1 Saund. 347, n. 7; *ante*, 292, note (*k*).

(*r*) See the notes to the plea of *non cepit*, *ante*, 291, and *cepit in alio loco*, *supra*. If the defendant have *had* the cattle in the place mentioned in the declaration, though he *took* them for *rent* or *damage feasant* in another close, he cannot plead *non cepit* or *cepit in alio loco*, but must plead as above; and see the forms, 1 Saund. 347 a; 2 B. & P. 480; 3 Wils. 295; 2 Wils. 354.

In General.

G. H., and a demise thereof to the defendant and his entry, and the distress damage feasant therein, as in the last form to the end, and then proceed as follows:] And the defendant afterwards, and immediately before the said time when &c., took and led the said [mare] from the said close, piece or parcel of ground so demised to him as aforesaid, to the said place in the said declaration mentioned, called the ——, in which &c, and at the said time when &c., had the same there in the way from the said close, piece or parcel of ground so demised as aforesaid, to a certain open pound in the parish of —— in the county aforesaid, there to be impounded for the damage so done in the said close, piece or parcel of ground so demised as aforesaid. And this the defendant is ready to verify, &c. [*as ante*, 292.

For Rent, &c.

Common avowry or cognizance for rent on 11 Geo. 2, c. 19, s. 22. (*s*)

2. For Rent, &c.

Commencement of avowry or cognizance, as ante, 291.] Because he says,

(*s*) See forms, Morg. 591; Tidd's Forms, 676. This general avowry is given in case of distresses for rent, &c. by 11 Geo. 2, c. 19, s. 22. See 1 Chit. Col. St. 675; 2 Saund. 284 c, n. 3; Gilb. Rep. 175 to 185. The above form will not suffice if the avowant be entitled to part only of the yearly rent, as if he be a tenant in common only; 6 Bingh. 104. See a form of avowry by tenant in common, *post*, 302. In the case in 6 Bingh. 104, the avowry was for rent due from the plaintiff, as tenant of premises to the avowant, under a demise before then made, at the yearly rent of £270; it was held not supported by proof of a conveyance to avowant, to which three trustees, the lessors, were parties, but which was executed by only two of them; and see the cases there cited.

The above avowry or cognizance admits the property of the goods in the plaintiff, 2 Taunt. 72; but if the plaintiff's plea in bar subsequently shows the property of the goods to be in another, the plaintiff cannot maintain the action; *id.*

How to make cognizance on behalf of a corporation, see 8 Wentw. 102; and by husband and wife, 2 Taunt. 180. A husband may avow in his own name for rent due in right of his wife; 2 Bingh. 71; Cro. Jac. 442, 282; 1 Mod. 273; 3 Salk. 207.

It is sometimes advisable to draw the avowry as at common law, setting out the title, in order that a traverse of a particular part of it may be taken, and that the parties may proceed to trial upon some particular point in issue; 2 Saund. 284 d.

In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by 11 Geo. 2, c. 19, s. 22, as upon a holding at a certain rent; and if he avow under the statute for the entire rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge at nisi prius may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the respective particles or parts into which the reversion has been divided; *Roberts* v. *Snell*, 1 M. & G. 577. A defendant may pay money into Court as to part of the distress and avow as to the residue; *Lambert* v. *Hepworth*, 2 G. & D. 112.

The defendant who succeeds on an avowry or cognizance for rent is entitled to double costs without certificate or suggestion; 1 Taunt. 210; 4 B. & C. 889; 2 Bing. 341.

If the premises have been in possession of an assignee of the lease, yet if the lessor has not assented to the assignment, it is said the avowry may state that the premises were held by the original lessee; 8 East, 316. It seems, however, advisable in such a case to insert two avowries, one on the holding of the lessee, and the other of the assignee.

An avowry stating that J. S. held the *locus in quo* as tenant to the defendant, under a demise thereof by A. to W. at a certain rent for a term not expired, J. S. being assignee of all W.'s estate and interest, and that rent was in arrear from J. S., is not good by stat. 11 Geo. 2, c. 19, s. 22, or stat. 21 Hen. 8, c. 19, s. 2, or by the two conjointly; *Banks* v. *Angell*, 7 A. & E. 843; 3 N. & P. 94, S. C. Where a distress had been made for rent in arrear by a party claiming as landlord, *quære*, whether a ratification of the distress by the party really entitled after plea pleaded, is sufficient; *Taylerson* v. *Peters*, 2 N. & P. 622; 7 A. & E. 110, S. C.; see note (*f*), *post*, 302.

The 11 Geo. 2, c. 19, s. 22, does not extend to an avowry for a rent-charge; 1 New Reports, 56. *See form of avowry for rent-charge*, *Beaupark* v. *Hutchinson*, 7 Bing. 178; 4 M. & P. 848, S. C., *post*.

Heriot *service* is within the statute, and

that the plaintiff [*or* " one J. K." (*t*)] for a long time, to wit, for the space of —— years (*u*) next before and ending on a certain day, to wit, the —— day of ——, A. D. ——, and from thence until and at the said time when &c. (*x*) held and enjoyed the said dwelling-house (*y*) in which &c., with the appurtenances, as tenant (*z*) thereof to the defendant, [*or* " G. H."] by virtue of a certain demise (*a*) thereof to the plaintiff (*b*) [*or* " the said J. K."] theretofore made at and under a certain yearly rent, to wit, the yearly rent of £——, payable quarterly, on &c. [*stating the days of payment* (*c*)] in every year, by even and equal portions,* and because (*d*) the sum of £—— (*e*) of the rent aforesaid, for the space of ——, (*f*) ending as aforesaid, on the —— day of ——, in the year aforesaid, and from thence until and at the said time when &c. (*g*) was due and in arrear from the plaintiff to the defendant [*or* " G. H." *in a cognisance,*] he the defendant well avows, [*or, if a cognisance,* " as bailiff of the said G. H. well acknowledges"] the

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lord may avow generally. Heriot *custom* is not; 2 Saund. 168 a; 2 Wils. 28. The avowry in the latter case must therefore allege seisin of lord, &c.; Co. Ent. 613 a.

That a party may distrain for one rent and avow for another, see 2 Bingh. 446, and cases there collected.

(*t*) See 8 East, 316; *supra*, note.

Quære, whether defendant may avow for rent due from a tenant described only as " a person unknown to the defendant;" *Banks* v. *Angell*, 7 A. & E. 843; 3 N. & P. 94, S. C.

(*u*) This is usually the time during which the rent distrained for was accruing due. The precise length of time is not material provided some rent was due, and the tenancy subsisted at the time of distraining; 6 East, 434.

(*x*) This is material. If the distress was made within six months *after the expiration of the tenancy*, under the 8 Ann, c. 14, the avowry must be framed accordingly, as in the form, *post*, 298. To entitle a party to distrain, he must have a reversionary interest in the premises at the time of the distress; 5 Bing. 24; 3 Bla. Com. 7, notes.

(*y*) State the premises as in the declaration. If other premises be demised besides the *locus in quo*, then say, " the said dwelling-house *amongst other premises*," but this is not absolutely requisite, as each part of the premises is liable to the whole rent; 6 B. & C. 34. The avowry also need not state more than what the rent issues out of, and therefore where furniture was also demised with a house it was held not necessary to mention the furniture; *id.* 251. It seems that though the avowry state a holding of more premises than in fact the tenant did hold, this will not be a fatal variance. Therefore where the avowry was for rent in arrear of a dwelling-house with the appurtenances, and it appeared in evidence that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants, it was held no variance; 10 Moore, 264.

(*z*) The want of a precise allegation that the plaintiff was tenant is not fatal, if it can be collected from the avowry that he is such tenant; *Innes* v. *Colquhon*, 7 Bing. 265; 5 M. & P. 63, S. C.

(*a*) The particulars of the demise need not be stated, but if stated must be proved as alleged; Doug. 665.

(*b*) If it at all be doubtful to whom the original letting was, the words " to him the plaintiff" should be omitted.

(*c*) The terms of the tenancy, as to the amount of the reserved rent and *times of payment*, must be accurately described, for a variance would be fatal; 4 Taunt. 420; 2 B. & A. 546; *Smith* v. *Walton*, 8 Bing. 235. But where the defendant avowed for three quarters of a year's rent at £115, under a holding from him, and at the trial the principal question was whether the rent was £115 or £100, and whether it was quarterly or half-yearly, and the jury found that it was £115 and that it was half-yearly, and that finding was entered on the record, the Court allowed the avowry to be amended under the 3 & 4 W. 4, c. 42, s. 24, although the plaintiff gave notice of his intention to oppose any amendment and to rely on the variance; *Gaylor* v. *Farrant*, 6 Dowl. 426.

If there be any doubt as to the amount of reserved rent, or the times when payable, other avowries should be added. *Quære*, whether an avowry stating the plaintiff to have held under a demise, at the yearly rent of £——, without stating when the rent was payable, does not infer that the rent was payable yearly; 2 Chit. Rep. 531; Latch, 261; Bradby, 26, n.

(*d*) See the use of this word, Carth. 328, 329.

(*e*) It is not material to prove the precise sum to be due as stated in the avowry, and if the defendant avow for two years and a quarter rent, he will recover, if he prove that two years were due at the time of making the distress; 6 East, 434; 5 T. R. 248; 3 B. & P. 348; 2 B. & A. 249; 4 B. & C. 938.

(*f*) The time during which the rent distrained for was accruing due.

(*g*) This is material; *supra*, n. (*x*).

For Rent, &c. taking of the said goods and chattels (*h*) in the said dwelling-house, (*i*) in which &c. and justly &c. as for (*k*) and in the name of a distress for the said rent so due and in arrear to the defendant [*or* "G. H."] as aforesaid, and which still remains due and unpaid. (*l*) And this the defendant is ready to verify, &c. [*as ante*, 292.

The like in a more general form. (*m*)

Commencement of avowry or cognizance as ante, 291.] Because he says, that he the defendant for a long time, to wit, for all the time during which the rent hereinafter mentioned was accruing due, and from thence until and at the said time when &c. was landlord of the plaintiff of the said dwelling-house, in which &c., and that the plaintiff for a long time, to wit, for the space of [half a year], ending on &c. and from thence until and at the said time when &c. held and enjoyed the said dwelling-house, in which &c. with the appurtenances, as tenant thereof to the defendant under a certain demise thereof theretofore made, at and under &c. [*As in the preceding form to the end.*

Avowry where part of the rent has been satisfied. (*n*)

Same as the form ante, 295, to the asterisk, and then proceed thus:] And because a large sum of money, to wit, the sum of £——, parcel of the sum of £——, of the rent aforesaid, for the said space of ——, ending as aforesaid, on the said —— day of ——, in the year aforesaid, and from thence until and at the time when &c. was due and in arrear from the plaintiff to the defendant (the residue of the said sum of £——, of the rent aforesaid, having been before then paid and satisfied), he the defendant well avows the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which &c. and justly &c. as for and in the name of a distress, for the said sum of £——, parcel &c. so due and in arrear as aforesaid, and which said sum of £——, parcel &c. still remains due and in arrear to the defendant as aforesaid. [*Conclude with a verification, as ante*, 292.

The like in another form, being a cognizance.

And the defendant, by ——, his attorney, as bailiff of E. F. well acknowledges the taking of the goods and chattels in the declaration mentioned, in the said messuage or dwelling-house, in which &c. and justly &c. because he says, that the plaintiff, for a long space of time, to wit, for the space of [one year and three-quarters of a year] next before and ending on &c. and from thence until and at the said time when &c. held and enjoyed the said [messuage or dwelling-house] in which &c. with the appurtenances, as tenant thereof to the said E. F. by virtue of a certain demise thereof to the plaintiff

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(*h*) If cattle or other things be alleged in the declaration to have been taken, then avow the taking of them also.

(*i*) If the taking be alleged in the declaration to have been in any other place than a dwelling-house, then let this avow the taking in such place.

(*k*) Not necessary after the "because, &c.;" Carth. 328, 329.

(*l*) It has been supposed that the words of the stat. 11 G. 2, c. 19, s. 22, render this allegation necessary; but see 2 Marsh. 386, 387; 7 Taunt. 72, S. C.; Gilb. Rep. 181.

(*m*) Observe the notes to the preceding form.

(*n*) See form, Tidd's Forms, 677. This form is not strictly necessary, for the plaintiff may avow for an entire year's rent, &c. though only part thereof be due: 3 B. & P. 348; 5 T. R. 248, n. (*c*); 1 Saund. 201, n. 1; 248, n. 8; 6 East, 437; Com. Dig. Pleader, 3 K. 14; but it is better to avow only for the rent which is really due, in order to avoid the expense which may otherwise be occasioned by the defendant's pleading *rien en arrear* as to that part of the rent which has been satisfied.

theretofore made, at and under the yearly rent of £——, payable quarterly, to wit, on &c. [*stating the days of payment*] in every year, by even and equal portions, and because £—— part of the rent aforesaid, for the said space of [one year and three quarters] ending as aforesaid, (the residue of the said rent being paid and satisfied), on &c. and from thence until and at the said time when &c. were due and in arrear from the plaintiff to the said E. F. the defendant, as bailiff of the said E. F., acknowledges the taking of the said goods in the said [messuage or dwelling-house] in which &c. and justly &c. as for and in the name of a distress for the said rent so due and in arrear as aforesaid, and which said rent still remains due and in arrear to the said E. F. And this, &c. [*Verification, as ante*, 292. For Rent, &c.

That although at the said time when &c. £—— of the rent aforesaid, being part of one year's rent due on the said —— day of ——, A.D. ——, aforesaid, were paid to the plaintiff, yet £—— of the said sum aforesaid, being the residue of the year's rent due on the said ——, were on that said day &c. in arrear &c. unpaid, &c. &c. The like in another form.

Commencement as ante, 291.] Because he says, that the said dwelling-house in which &c. in the said declaration mentioned, is, and at the said time when &c. and for ten years then last past, and long before, was parcel of a certain ancient tenement in the parish aforesaid, called Jarde, otherwise Yard-place, then in the holding of the said J. C. and that the said tenement whereof &c., with the appurtenances, on the feast-day of St. Michael the Archangel, in the year of our Lord ——, and for the space of four years then last past and more, and also at the same time when &c. was and still is held by the said J. C. of the said F. H. as of his manor of Clysthydon, with the appurtenances, in the said county, by and under the yearly rent of four shillings, amongst other things, payable yearly on the feast-day of St. Michael the Archangel, of which said manor the said F. H. during all the time aforesaid and long before was and ever since hath been and still is seised in his demesne as of fee. And that the said J. C. before the rent next hereinafter mentioned, or any part thereof, became due, entered into the said tenement whereof &c. with the appurtenances, and was seised thereof in his demesne as of fee. And because sixteen shillings of the rent aforesaid, for four years, ending on the feast-day of St. Michael the Archangel, in the year of our Lord ——, on the feast in that year, and also at the said time when &c. were due, in arrear, and unpaid to the said F. H., he the said T. as bailiff of the said F. H., well acknowledges the taking of the said goods and chattels in the said dwelling-house in which &c. so being part of the said tenement, with the appurtenances, in form aforesaid, and justly &c. as a distress for the aforesaid rent, so being due, in arrear, and unpaid to the said F. H. according to the form of the statute in such case made and provided, and the said rent still remains wholly due, in arrear, and unpaid. And this the said T. is ready to verify; wherefore he prays judgment, and a return of the said goods and chattels, together with his damages, costs and Cognizance for a quit rent. (*o*)

(*o*) See 5 Wentw. 150. An avowry not showing who was defendant's tenant of the *locus in quo*, nor that the place was in lands or tenements of which the defendant was seised as within his fee or seigniory, is not good under the stat. 21 Hen. 8, c. 19, s. 2; *Banks* v. *Angell*, 7 A. & E. 843; 3 N. & P. 94, S. C.

FOR RENT, &c.

charges in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him.

Cognizance where the rent was at so much per acre, and quantity not ascertained. (p)

Commencement of common avowry, or cognizance, as ante, 291.] Because he says, that the plaintiff, before the said time when &c. to wit, on &c. and for a long space of time, to wit, for the space of two years and three-quarters of a year then last past, and continually from thence until and at the said time when &c. held and enjoyed a certain mansion-house, out-houses &c. with the appurtenances, and also divers acres of land, with the appurtenances, in the parish of &c. (whereof the said places in which &c. were and are parcel), as tenant thereof to the said E. F. under a certain demise thereof theretofore made, at a certain yearly rent, to wit, &c. and also the further yearly rent, after the rate of —— shillings per acre, for each of the said acres of land, payable quarterly, to wit, on &c. [*stating the quarter-days*], in each and every year, in even and equal portions, and the defendant avers that the said acres of land so held and enjoyed by the plaintiff as last aforesaid, during the time last aforesaid, amounted to divers, to wit, 118 acres of land, and because a large sum of money, to wit, the sum of £—— of the rent last aforesaid, for two years and three-quarters of a year, ending on &c. as aforesaid, became and was due, and thenceforth until and at the same time when &c. was in arrear and unpaid to the said E. F., he the defendant, as bailiff of the said E. F., well acknowledges the taking the said goods and chattels in the said places in which &c. and justly &c.

Avowry for rent when the goods were distrained within six months after the end of the term, under 8 Ann. c. 14, ss. 6 and 7. (q)

And the defendant, by ——, his attorney, well avows the taking of the said [goods and chattels] in the said declaration mentioned, in the said [place] in which &c. and justly &c. because he says, that the plaintiff, for the space of [two years] and more next before and ending on the —— day of ——, in the year of our Lord ——, held and enjoyed the said [dwelling-house] in which &c. with the appurtenances, as tenant (r) thereof to the defendant, under and by virtue of a certain demise thereof before then made by the defendant to the plaintiff at a certain yearly rent of £—— payable on &c. [*stating the days of payment*] in every year. And the plaintiff continued and was in the possession (s) of the said dwelling-house, with the appurtenances, in which &c. from the said —— day of ——, in the year aforesaid, until and at the said time when &c. And because [£6 : 11*s.*] of the rent aforesaid, that is to say, [£5 : 10*s.*] from the year ending on the said —— day of —— in the year of our Lord [1830,] and [£1 : 1*s.*] part

(p) See Vin. Abr. Distress, E. pl. 10; 3 B. & Ald. 692; unless a specific rent be agreed upon the landlord cannot distrain, 6 B. & Ald. 322; 2 Taunt. 148.

(q) The title of defendant need not be set out, see 11 Geo. 2, c. 19, s. 22. See a form against an administrator, 1 Hen. Bla. 465, and another form, where there was a custom to have an away-going crop, 1 Hen. Bla. 5. See the notes to 1 Chit. Col. Stat. 665. Where a tenant of a farm gave up possession of the house to the incoming tenant, (the land having been previously given up), a few days after the determination of the demise, and left a cow and some pigs on the premises without leave of the incoming tenant; it was held, that so doing did not constitute a continuance in possession so as to entitle the landlord to distrain under 8 Ann. c. 14, ss. 6, 7; *Taylerson* v. *Peters*, 7 A. & E. 110; 2 N. & P. 622, S. C.

(r) See *ante*, 295, note (z).

(s) It need not be a tortious holding over, or a holding over of the whole premises; 4 B. & C. 51; 6 D. & R. 155, S. C. Therefore a landlord who permits his tenant to retain possession of part of a farm after a tenancy has expired may distrain, under the 8 Ann. c. 14, ss. 6 and 7, on that part, within six months after the expiration of the tenancy, *id.*

of a [year's] rent, from the —— day of —— [1828], to the —— day of —— [1829], left unpaid and in arrear on the said —— day of —— [1830]; and also at the said time when &c. was due and in arrear and unpaid to the defendant, he the defendant well avows the taking of the said [goods and chattels] in the said declaration mentioned, in the said [place] in which &c. at the said time when &c. the said time when &c. being within the space of six calendar months after the said —— day of —— in the said year of our Lord [1830], and during the continuance of the title and interest of the defendant in the said [dwelling-house] with the appurtenances, in which &c. and during the possession of the plaintiff, and justly &c. for and in the name of a distress for the said rent so due, in arrear, and unpaid as aforesaid; and which said rent now remains due, in arrear, and unpaid. And this the defendant is ready to verify; wherefore he prays judgment, and a return of the said goods and chattels, together with his damages, &c. according to the form of the statute in such case made and provided, to be adjudged to him, &c.

Cognizance for a distress for rent of cattle on common appurtenant, under 11 Geo. 2, c. 19, s. 8. (t)

And the defendant, by ——, his attorney, as bailiff of E. F., well acknowledges the taking of the said [hay, grass, cattle, goods and chattels] in the said declaration mentioned, (except the said one-wheel cart, (u)) in the said places in which &c. (x) and justly &c. because he says, that the plaintiff, for a long time, to wit, for the space of —— years next before and ending on the —— day of —— in the year aforesaid, and from thence until and at the said time when &c. held and enjoyed the said closes called —— and the said messuage and dwelling in which &c. amongst other things, (y) as tenant thereof to the said E. F. by virtue of a certain demise thereof to him the plaintiff (z) theretofore made, at and under a certain yearly rent, to wit, the yearly rent of £—— payable &c. and because the sum of £—— of the rent aforesaid, for the said space of three years ending as aforesaid, on &c. in the year aforesaid, and from thence until and at the said time when &c. was due and in arrear from the plaintiff to the said E. F. he the defendant, as bailiff of the said E. F. well acknowledges the taking of the said hay, grass, cattle, goods and chattels (except the said one-wheel cart) in the said places in which (a) the said cattle then being feeding and depasturing in and upon the said waste or common called Aston, and the plaintiff in replevin then exercising and enjoying a right of common of pasturing thereon, appurtenant and belonging to the said demised premises, and justly &c. as for and in the name of a distress for the said rent so due and in arrear to the said E. F. as aforesaid. And this &c. [*Conclude with a verification, as ante*, 292.

(t) This cognizance was settled with great care by an eminent pleader, afterwards raised to the bench.

(u) By the stat. 11 Geo. 2, c. 19, s. 8, *cattle* or *stock* feeding on a common, &c. belonging to the demised premises, may be distrained, but the law gives no authority to distrain the tenant's *cart* upon the common. That could only be distrained upon the demised premises, unless fraudulently removed to prevent its being distrained; see 1 Chit. Col. Stat. 671, 662, 663, notes.

(x) The declaration specified in what particular places the different articles were taken, some in a dwelling-house, &c. and some on a waste.

(y) If the rent be not for any other land or premises than the two fields, and the messuage mentioned in the declaration, the words, "amongst other things," should be struck out.

(z) If the original letting was not to him these words must be omitted.

(a) The pleader doubted whether the right ought not here to be more particularly stated, but advised, that unless this general statement were specially demurred to, as not being sufficiently particular, it would suffice.

FOR RENT, &c.

Avowry and cognizance on the 11 Geo. 2, c. 19, s. 1, for a distress for rent on goods fraudulently removed from demised premises. (*b*)

And the defendants C. and D., by ——, their attorney, come, and the said C. in his own right well avows, and the said D. as bailiff of the said C. well acknowledges, the taking &c. in the said [place] in which &c. because they say, that the plaintiff, for the space of [one year] next before and ending on &c. [*the day the rent fell due*] *and from thence until and at the said time when &c.* enjoyed a certain [messuage, tenement and premises] situate and being &c. as tenant thereof to the said C. under and by virtue of a certain demise, theretofore, to wit, on the —— day of ——, A. D. ——, made by the said C. to the plaintiff for the term of —— years from thence next ensuing [*or* "for one whole year from thence next ensuing, and so on from year to year as long as the plaintiff and the defendant should think fit"] (*c*) at and under the [yearly] rent of £—— payable on &c. [*stating the days of payment*] in the said year; and because the sum of £—— of the rent aforesaid, for [the year] aforesaid, ending on &c. [*the day the rent fell due*] on that day, and from thence until and at the said time when &c. was due, in arrear, and unpaid from the plaintiff to the said C. and because the said goods and chattels in the said declaration mentioned [*before the said time when &c. and after the rent aforesaid became due and payable from the plaintiff to the said C., to* (*b*) *wit, on &c.*] were wrongfully, fraudulently and unjustly removed and taken by the plaintiff from and out of the said [messuage, tenement and premises aforesaid] so demised by the said C. to the plaintiff, with intent wrongfully and unjustly to defraud the said C. of the said rent, and to prevent the said C. from distraining the same for the said arrears of rent, against the form of the statute in such case made and provided; and also because the said goods and chattels were afterwards, to wit, on the day and year last aforesaid, put and placed by the plaintiff into the said place in which &c. in the said declaration mentioned, the said C. in his own right well avows, and the said D. as bailiff of the said C. well acknowledges, the taking of the said goods and chattels in the said [place] in which &c. in the said declaration mentioned, and justly &c. at the said time when &c. (the same being within thirty days next after the said fraudulent removal of the said goods and chattels from and out of the said [messuage, tenement and premises] so demised as aforesaid, by the said C. to the plaintiff,) for and in the name of a distress for the rent so being due and in arrear &c. And this &c. wherefore &c. [*Conclude with a verification, as ante, 292.*

Avowry for

Avowry, commencing as ante, 291.] Because he says, that before and at

(*b*) See the notes and cases upon this enactment, and the third section of the 11 Geo. 2, c. 19, *ante*, vol. ii. 345, and 1 Chit. Col. Stat. 669, and notes. The avowry must be special; 4 Campb. 136. In order to support it, the goods must be the property of the tenant, 5 M. & Sel. 48, and the plea should show it; *id.* It has been said, that to justify the landlord distraining under this act, the rent must be in arrear at the time of the removal, 2 Saund. 284, n.; 3 Esp. 15; 2 Saund. 2, n. *b*; *sed vide* 4 Campb. 136; 2 Saund. 284, *contrà*; and the words of the act seem to be against the correctness of such a doctrine. How far a creditor may remove, 5 M. & Sel. 200, and what proof of fraudulent removal, 9 Price, 301; 3 D. & R. 501. The removal need not be clandestine as well as fraudulent; 4 D. & R. 33. It is immaterial at what time the goods are removed, whether by day or night; *id. ibid.*; 1 Car. Rep. 121. But it is now settled after conflicting decisions that the landlord cannot distrain, unless the rent was over-due; *Read v. Vaughan and another*, 1 Hodge's Rep. 173; and *ante*, vol. ii. 345, note (*a*).

(*c*) That these particulars of the demise are necessary, see *Bowler v. Nicholson*, 12 A. & E. 341; 4 P. & D. 16, S. C.

double rent, plaintiff holding over after notice to quit given by him, on 11 Geo. 2, c. 19.(*d*)

the said time when &c. he the defendant was seised in his demesne as of fee of and in the [dwelling-house] in which &c. and being so seised, he the defendant heretofore, and before the said time when &c., to wit, on &c., demised to the plaintiff the said [dwelling-house] in which &c. to hold the same to the plaintiff from the day and year last aforesaid for one whole year then next ensuing, and so from year to year so long as the defendant and plaintiff should respectively please, at the yearly rent or sum of [£18] payable [quarterly], to wit, on &c. [*stating days of payment*] in each and every year, by even and equal portions, determinable by the defendant or the plaintiff by [three] months' notice to quit, given by the defendant to the plaintiff or by the plaintiff to the defendant; (*e*) by virtue of which said demise the plaintiff on the said &c. entered into and upon the said demised premises and became and was possessed thereof, and being so possessed, before the said time when &c. and before the [—— of ——, 18—] to wit, on &c. aforesaid, he the plaintiff gave to the defendant notice that he the plaintiff would quit and deliver up possession of the said dwelling-house and premises so by him holden as aforesaid, on the [—— of ——] then next, being [three] months from the time of giving such notice as aforesaid. And the defendant further saith, that the plaintiff did not nor would, on the day and year last aforesaid, quit or deliver up possession of the said [dwelling-house] and premises pursuant to the said notice, but then refused so to do; and on the contrary thereof, without the consent of the defendant, held over and continued possession of the said [dwelling-house and] premises, from the day and year last aforesaid until and at the said time when &c. although the defendant during that time was entitled to the possession thereof from the plaintiff, whereby the plaintiff then became liable to pay to the defendant during the time he the plaintiff continued in possession of the said [dwelling-house and] premises after the said [—— of ——, A. D. 18—] as aforesaid, the yearly rent of [£36], being at the rate of double the rent or sum which the plaintiff would otherwise have paid in case the said notice had not been so given; and because the sum of [£18] of the said rent of [£36] for [one half] year next before and ending on the said [—— day of ——, A. D. 18—] aforesaid, and from thence until and at the said time when &c. was due and in arrear from the plaintiff to the defendant, he the defendant well avows the taking of the said goods and chattels in the said declaration mentioned in the said [dwelling-house] in which &c. and justly &c. as for and in the name of a distress for the said rent so due and in arrear to the defendant as aforesaid, and which still remains due and unpaid. And this &c. [*Conclude with a verification, as ante, 292.*

Cognizance as

And the defendant, by ——, his attorney, as the bailiff of C. J. B. Esq.,

(*d*) A landlord may distrain for double rent where the tenant holds over after his own notice, but not for double value where he holds over after the landlord's notice; see 1 Chit. Col. Stat. 674, and notes; and see the form of declaration for double rent, *ante*, vol. ii. 344; for double value, *id.* 342. It seems that an avowry for double rent may be maintained, though the single rent only be due; see 4 B. & C. 922.

(*e*) The terms of the tenancy and of the notice to quit should be so shown, that the tenant's power to determine the tenancy by notice to his landlord for that purpose, and the sufficiency in law of the notice actually given, may appear. It is not sufficient (on special demurrer) to allege that the tenant, "having power to determine by such a notice as hereinafter mentioned," gave a notice to quit on a given day past; *Humberstone* v. *Dubois*, 10 M. & W. 765.

FOR RENT, &c. bailiff of an executor, under 32 Hen. 8, c. 37, for a distress for rent due to deceased. (*f*)

executor of the last will and testament of Sir C. B. Knt. deceased, well acknowledges the taking of the said [goods and chattels] in the said declaration mentioned, in the said [dwelling-house] in which &c. and justly &c. because he saith, that the plaintiff for a long space of time and during all the time which the rent hereinafter mentioned was accruing due, to wit, continually from the —— day of ——, in the year of our Lord ——, until and upon the —— day of —— in the same year, and from thence until the time of the death of the said Sir C. B., which happened heretofore, to wit, on &c. held and enjoyed the said [dwelling-house] in which &c. with the appurtenances, as tenant (*g*) thereof to the said Sir C. B. under and by virtue of a certain demise thereof theretofore made, at and under the yearly rent of £——, payable quarterly, to wit, on &c. [*stating the quarterly days*] in each and every year (*h*); and because a large sum of money, to wit, the sum of £—— of the rent aforesaid, for the space of one quarter of a year of the said time, ending on &c. became and was due and in arrear to the said Sir C. B. deceased, in his lifetime, and continued so in arrear and unpaid until and at the time of the death of the said Sir C. B. and from thence until and at the said time when &c. continued in arrear from the plaintiff to the said C. J. B. as such executor as aforesaid, and because the plaintiff remained in possession of the said [dwelling-house] in which &c. from the death of the said Sir C. B. until the said time when &c. the defendant as bailiff of the said C. J. B. as such executor as aforesaid, well acknowledges the taking of the said [goods and chattels] in the said declaration mentioned, in the said [dwelling-house] in which &c. and justly &c. as for and in the name of a distress for the said rent so due and in arrear as aforesaid, and which said rent still remains due, in arrear and unpaid. And this, &c. [*Verification as ante, 292, and conclude with a profert of the letters testamentary, as ante,* vol. ii. *73, and then insert a cognizance for rent due to executor as a devisee in his own right, not stating the derivative character, if there be any ground for such a cognizance.*

Avowry by one tenant in common for rent due to him. (*i*)

Commencement of avowry as ante, 291.] Because he says, that he the plaintiff, for a long space of time, to wit, for the space of —— next before

(*f*) This plea held good, see 3 Moore, 608; 1 B. & B. 279, S. C.; 8 Taunt. 159; 2 Moore, 48; 4 Moore, 409; 2 Bing. 193. See Bradly on Distresses, 74, &c. and the notes, 1 Chit. Col. Stat. 659. *Quære,* whether this statute extends to all rent services reserved upon leases for years, as well as upon freehold leases; 2 Moore, 48. How to plead to, see 2 B. & B. 36; 3 Moore, 608; 1 B. & B. 279, S. C. By statute 3 & 4 W. 4, c. 42, s. 37, an executor or administrator may *now* in all cases distrain for arrears of rent due in lifetime of testator, though before it was otherwise; *Prescott* v. *Boucher,* 3 Bar. & Adol. 849. Where a distress is made by command and in the name of a landlord, but he dies before the distress is actually made, the executor may ratify it, and the bailiff may make cognizance as the bailiff of the executor, under 32 Hen. 8, c. 37, who ratified the distress, although before probate; *Whitehead* v. *Taylor,* 10 A. & E. 210; 2 P. & D. 367, S. C.

(*g*) See *ante,* 295, note (s).

(*h*) It is unnecessary for the defendant to show how the plaintiff became entitled to or held the premises; 2 Moore, 48; 8 Taunt. 159, S. C. The testator's title need not be shown; neither need it be shown that the executor was entitled to distrain, at least the omission of these averments is immaterial after verdict; 3 Moore, 608; 1 B. & B. 279, S. C.

(*i*) See the forms, 5 T. R. 246; 8 Wentw. 122. See form of avowry by a joint tenant, Carth. 328. The above form of avowry must be adopted where the avowant has not a right to the entire rent; see 6 Bing. 104; *ante,* 294. Tenants in common cannot join in an avowry for rent, though they must join in an avowry for damage feasant; 5 T. R. 246; Sir Wm. Jones, 253; 2 Hen. Bls. 386. One joint-tenant may, without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint-tenants, 4 Bing. 562; and

and ending on the —— day of ——, A. D. ——, and from thence until and at the same time, when &c. held and enjoyed one undivided moiety [the whole into two equal moieties to be divided] of the said dwelling-house, in which &c. with the appurtenances, as tenant (*k*) thereof to the defendant, under and by virtue of a certain demise thereof to the plaintiff theretofore made, at and under the yearly rent of £—— payable quarterly, on the &c. [*stating the entire rent and the days of payment*] in every year, by equal and even portions; and because one undivided moiety of the sum of £—— of the rent aforesaid, for the space of ——, ending as aforesaid, on the said —— day of ——, A. D. ——, aforesaid, and from thence until and at the said time when &c. was due and in arrear from the plaintiff to the defendant, he the defendant well avows the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which &c. and justly &c. as for and in the name of a distress for the said undivided moiety of the said rent so due and in arrear and unpaid as aforesaid, and which is still due, in arrear and unpaid. And this the defendant is ready to verify, wherefore he prays judgment and a return of the said goods and chattels, together with his damages &c. according to the form of the statute in such case made and provided to be adjudged to him &c. And for a cognizance in this behalf the defendant, as bailiff of G. H., well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which &c. and justly &c. Because he says, &c. [*Cognizance as bailiff of the other tenant in common for an undivided moiety of the rent due to him, similar to the above avowry, and see ante, 299, as to the language of the cognizance.*

Cognizance as bailiff of J. S. for rent due to him in respect of £10 an acre for every acre of land, &c. improperly managed by plaintiff.

And for a further cognisance in this behalf, the defendant, as bailiff of ——, further well acknowledges the taking of the said goods and chattels in the said declaration mentioned in the said close in which &c. and justly &c. because he says, that the plaintiff, before the said time when &c. to wit, on the —— day of ——, A. D. ——, and for a long space of time, to wit, for the space of one year then last past, and continually from thence until and at the said time when &c. held and enjoyed a certain other messuage or tenement, closes, marshes, lands, grounds and premises, with the appurtenances, in the parish and county aforesaid (whereof the said close in which &c. at the said time &c. was parcel,) as tenant thereof to the said ——, under and by virtue of a certain demise thereof to the plaintiff theretofore made, at, amongst other rents, the yearly rent or sum of £—— for every

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in general if a party has an interest to entitle him to distrain, his being bailiff is not traversable, Year Book, 15 Hen. 7, 17 a. In 2 B. & B. 465; 5 Moore, 297, S. C.; it was held that an avowry by one of several co-heirs in gavel-kind, and a cognizance as bailiff of the other co-heirs need not aver an authority to distrain from the other co-heirs. The avowry for rent must be *de una medietate* of the whole rent, and not of a certain sum, which amounts to a moiety; Carth. 289; 1 Ld. Raym. 423; 1 Salk. 291; 5 Mod. 25; Bac. Ab. Joint-tenant, &c. K.; *sed vide per* Abbott, C. J. 4 B. & C. 158. In 3 Salk. 207; 5 T. R. 247, it is said, if three tenants in common distrain thirty beasts, they must each of them avow separately for ten. Where land was demised by four persons (whose original title did not appear) at one entire rent, to be divided and paid separately in equal portions, and one of the four distrained upon the tenant for her own share of the rent, it was held the distress was regular; for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant they were tenants in common, and entitled each to a separate distress; 1 M. & Y. 107.

(*k*) See *ante*, 295, note (s).

For Rent, &c. acre, and so in proportion for any less quantity than an acre of all and every the said closes, marshes, lands, grounds and premises, which should at any time during the said demise be managed in a bad and unhusbandlike manner, payable quarterly, to wit, on the 6th day of January, the 6th day of April, the 6th day of July and the 11th day of October in every year, the first of such quarterly payments of the said yearly rent or sum of £—— to be made on such of the said days or times of payment as should happen next after the said yearly rent or sum of £—— was incurred, the said yearly rent or sum of £——, when incurred, to continue payable thenceforth during the residue of the said demise. And the defendant avers, that during the residue of the said demise, to wit, on the —— day of ——, A. D. ——, and on divers other days and times afterwards, the plaintiff managed in a bad and unhusbandlike manner divers, to wit, 250 acres of the said closes, marshes, lands, grounds and premises, by reason whereof a large sum of money, to wit, the sum of £2500 of the said yearly rent or sum of £10 for each and every acre of the said closes, marshes, lands, grounds and premises, so managed as aforesaid, being at the rate of £—— for each and every of those acres so managed as aforesaid, for the space of one year, ending on the said —— day of ——, A. D. ——, and then last elapsed, became and was due and payable, and thenceforth until and at the same time, when &c. remained in arrear and unpaid to the said ——, wherefore the defendant, as bailiff of the said ——, and by his command, in that behalf, well acknowledges the taking of the said goods and chattels in the said declaration mentioned in the said closes in which &c. so being parcel of the said messuage or tenement, closes, marshes, lands, grounds and premises, with the appurtenances, in form aforesaid, and justly &c. for and in the name of a distress for the said rent so due, in arrear and unpaid as aforesaid, and which said rent now remains due, in arrear and unpaid. And this the defendant is ready to verify; wherefore he prays judgment and a return of the said goods and chattels, together with his damages &c. according to the form of the statute in such case made and provided, to be adjudged to him &c.

Avowry for a rent-charge. (*l*)

And the defendants, by ——, their attorney, come, and the said J. S., in his own right, well avows, and the said W. Pacey, as bailiff of the said J. S., well acknowledges the taking of the said cattle, goods and chattels of the plaintiff in the said declaration mentioned, in certain closes situate in the parish of H. in the said county, when &c. and justly &c. because they say, that the said closes in which &c. heretofore, to wit, on the 10th day of November, A. D. ——, were part and parcel of the freehold premises of one J. S. since deceased

(*l*) This is a good avowry now, since the case in 9 Moore, 667, shows that the 11 Geo. 2, c. 19, allowing a general avowry, extends to rent-charges, and over-ruling 1 New Rep. 56, *semble*. This plea was settled with much care, and has been used in many cases. See form of avowry for a rent-charge, *Beaupark* v. *Hutchinson*, 7 Bing. 178; 4 Moore & P. 848, S. C.

Where a rent-charge was devised to A. so long as her conduct and behaviour should be discrete and meet with the approbation of J. S.; it was held, that in an avowry under the rent-charge, the discreteness of the conduct and behaviour of A and the approbation of J. S. need not be averred, as they were conditions subsequent; *Wynne* v. *Wynne*, 2 M. & G. 8. An avowry for a rent-charge devised to A. the wife of B. may be made by B. and A. in the right of A., even, it seems, although the rent-charge issue out of a term of years; *Id. ibid.* A rent charge granted for life by a tenant for years is not void, but good as a chattel interest, and the goods of a stranger not shown to hold the premises by title paramount to the rent-charge (as by prior demise) may be distrained for the arrears; *Saffery* v. *Elgood*, 1 A. & E. 191.

(late father of the defendant J. S.) and continued part and parcel of the said freehold premises of the said J. S. since deceased, until and at the time of his decease, to wit, on &c. and from thence until on &c. the day of taking of the said cattle, goods and chattels, and the said taking was done under and in pursuance of a certain power and authority contained in the last will and testament of the said J. S. deceased, bearing date heretofore, to wit, the —— day of ——, A. D. ——, for the raising and paying the arrears of a certain annuity, yearly rent, or sum of £——, given and bequeathed in and by the said will to the defendant J. S., for and during the term of his natural life, payable by four equal quarterly payments, that is to say, Lady-day, Midsummer, Michaelmas and Christmas, and was charged and chargeable under and by virtue of the said last will and testament on the said freehold premises of the said J. S. deceased, situate in the said county, and because the sum of £585, being the arrears of the said annuity, yearly rent, or sum of £——, for nineteen years and a half, accruing due at Christmas-day last, was behind and unpaid by the space of twenty days after the said Christmas-day, and the same having been lawfully demanded and not then paid, the said J. S. the defendant, in his own right, well avows, and the said W. F., as bailiff to the said J. S., well acknowledges the taking the said cattle, goods and chattels, in the said declaration mentioned, to satisfy the said arrears of the said annuity, yearly rent, or sum of £30, and which still remain due and unpaid. And this the defendants are ready to verify; wherefore they pray judgment and a return of the said cattle, goods and chattels, together with the damages &c. according to the form of the statute in such case made and provided.

Avowry for arrears of an annuity or rent charge. (m)

Commencement as ante, 291.] Because he says, that one S. W., on the —— day of ——, in the year of our Lord ——, was seised of the said closes, in which &c. for the term of her natural life, and being so seised, afterwards, to wit, on &c., married one F. G., whereby the said S. W. and the said F. G. became seised of the said closes, in which &c., in right of the said S., and being so seised, before the time when, &c., to wit, &c., by indentures of that date, made between the said F. G. and S. his wife of the one part, and one J. H. and the defendant of the other part, which said indenture [*profert*] the said F. G. and S. his wife gave, granted and confirmed unto the said J. H. and the defendant, their executors, administrators and assigns, one annuity or clear rent-charge or annual sum of £——, to be yearly issuing and payable, and to be charged upon, had, received and taken from and out of the said closes, in which &c., and divers other closes of land in the same county, in the said indenture mentioned, to have and to hold, receive, perceive, take and enjoy the said annuity or clear yearly sum of £—— unto them the said J. H. and the defendant, their executors and administrators, from thenceforth for and during the term of the life of the said S. the wife of the said F. G.; and the said F. G. did, in and by the said indenture, for himself, his heirs, executors and administrators, further grant, covenant,

(m) The grantee, under the 2 Will. 3, c. 5, and 4 Geo. 2, c. 28, and the power in the indenture mentioned in the avowry, may distrain in the same manner as a landlord under a distress for rent; and the goods of a stranger are distrainable for such a rent-charge under such a power; *Johnson* v. *Faulkner*, 2 G. & D. 184. If the plaintiff holds under a lease made prior to the rent charge, he must reply that fact; *Id. ibid.*; *Howell* v. *Bell*, 3 Salk. 136; 1 Ld. Raym. 172, S. C.

FOR RENT, &c. promise and agree, to and with the said J. H. and the defendant, their executors and administrators, in case the said annuity of £—— or any part thereof should happen to be behind or unpaid by the space of twenty days next over or after either of the said days or times whereon the same was appointed to be paid as aforesaid, that then and so often and from time to time as the same should happen, it should and might be lawful to and for the said J. H. and the defendant, their executors or administrators, into and upon the said several hereditaments, out of which the same was made payable as aforesaid, or any of them, or any part thereof, to enter and distrain, and the distress and distresses then and there found to take, seize, lead, drive, carry away, impound, detain and keep, sell and dispose of the same, in the same manner as the law directs in cases of rent in arrear, until the said annuity and all arrears thereof, and all costs, charges and expenses which might be occasioned, sustained or incurred for or by reason or on account of the non-payment or undue payment thereof, should be fully paid and satisfied unto the said J. H. and the defendant, their executors and administrators, as by the said indenture &c. will appear &c. And the defendant further says, that after the making of the said indenture, and before the [4th day of September, 18—] and the said time, when &c., to wit, on the —— day of ——, 18—, the said J. H. died. And the defendant further says, that afterwards and during the life of the said S. (*n*) the wife of the said F. G., to wit, on the [4th day of September, 18—,] £—— of the said annuity or yearly sum for the space of one half of a year, ending on the day and year last aforesaid, became and was due and in arrear and unpaid, and so continued due and in arrear and unpaid for the space of twenty days next over and after the day and year last aforesaid, and from thence and until and at the said time when &c. the said S., the wife of the said F. G. at the said time when &c. being alive, wherefore the defendant in his own right well avows the taking &c. to satisfy the said arrears of the said annuity, yearly rent or sum. And this the the defendant is ready to verify, &c.

Cognizance for arrears of an annuity or rent-charge, and pleadings thereon.

See *Millar* v. *Green*, 8 Bing. 92.

Cognizance for the arrears of an annuity, and other pleadings thereupon.

See *Richardson* v. *Tomkies*, 9 Bing. 51.

Avowry for interest on a mortgage deed containing power of entry and distress.

See *Chapman* v. *Beecham*, 3 G. & D. 71.

(*n*) Where it is necessary to a plea of justification under a lease from a tenant for life, that he should be still living, the defendant must aver the continuance of the life, otherwise the plea is bad on general demurrer; *Dayrell* v. *Hoare*, 4 P. & D. 114.

3. Poor Rate.

Avowry for poor's rate. (*o*)

And for an avowry in this behalf, the defendant, as churchwarden of the parish of ——, in the county of —— aforesaid, and the said E. F. as overseer of the same parish, well avow the taking of the said [stack of hay] of the plaintiff, as in the said declaration mentioned, in the said [place] in which &c., and justly, because they say, that the seizing, taking and detaining of the said [stack of hay] as in the said declaration mentioned were done by them the defendant and E. F. by authority of a certain act of parliament made in the parliament of the Lady Elizabeth, late Queen of England, holden at Westminster, in the county of Middlesex, intituled, "An Act for the Relief of the Poor," and according to the tenor, purport and effect of the same act. And this &c. [*Conclude with a verification, as ante*, 292.

4. Repair of Sewers.

Cognizance for an amercement by commissioners of sewers, for neglect to repair.

See *Ramsey* v. *Nornabell*, 11 A. & E. 383; 3 P. & D. 253, S. C.; *Emmerson* v. *Saltmarshe*, 7 A. & E. 266; and 3 & 4 Will. 4, c. 22, s. 53.

5. Damage Feasant.

Avowry by a freeholder under a distress damage feasant. (*p*)

Commencement of avowry, as ante, 291.] Because he saith, that the said place in which &c. (*q*) now is, and at the said time when &c. was the close, soil and freehold of the defendant, (*r*) and because the said [cattle] *at the said time when* (*s*) &c. were in the said place in which &c. eating up the

(*o*) The statute 43 Eliz. c. 2, s. 19, gives the general issue not guilty in case of a distress for poor rates, and also the above special plea. See form, 2 Rich. C. P. 355; 2 Moore, 417; and see *Governor of Bristol* v. *Wait*, 3 Nev. & Man. 359; 1 Adol. & El. 264, S. C.; *Bruce and others* v. *Willis and others*, 3 P. & D. 220; *Skingley* v. *Surridge*, 11 M. & W. 503; and see the pleadings in *Bardons* v. *Selby*, 1 Crom. & M. 500; 3 Bar. & Adol. 2. The avowant in this case is only entitled to single costs under the statute; 1 B. & B. 517. In pleading a surveyor's assessment, made on occupiers of lands under stat. 13 Geo. 3, c. 78, ss. 30, 45, it was held to be necessary to aver that the assessment did not exceed 9*d.* in the pound *on the yearly value of the lands*; although the limitation as to value annexed to the above sections was contained in a distinct proviso; and although the form of an order of justices in the schedule to the act, adapted to the above sections, made no mention of yearly value; *Morell* v. *Harvey*, 4 A. & E. 684. The above act was repealed by the present Highway Act, 5 & 6 Will. 4, c. 50, s. 29 of which enacts that no rate levied at one time shall exceed 10*d.* in the pound, or 2*s.* 6*d.* in the pound in any one year.

Where poor rates had not been duly published on the Sunday following the allowance, according to stat. 17 Geo. 2, c. 3, and a warrant of distress issued for a single rate, made up of these rates and of others which were regular, it was held that the warrant was wholly bad, and that replevin lay for a distress taken under it; *Sibbald* v. *Roderick*, 11 A. & E. 38; 3 P. & D. 206, S. C.

(*p*) See form, Plead. Assist. 471, 475; 2 Rich. C. P. 7, 368; Morg. 600. As to this plea in general, see 1 Saund. 347 d, note 6. It is necessary to set forth the nature of the plaintiff's title, and it is not sufficient, as in trespass, merely to say that the defendant was lawfully possessed, &c.; 2 B. & P. 359; 2 Saund. 284 d, 285; 1 Saund. 347 d. How tenants in common are to avow, see 2 Hen. Bla. 386.

(*q*) Where the defendant is only seised of part of the field, &c. mentioned in the declaration, it is advisable in the avowry to qualify the statement of the seisin accordingly; 1 Saund. 347 d, n. 5; and see 2 Hen. Bla. 386.

(*r*) In an avowry by a freeholder, the words *close*, *soil*, and *freeholder*, are sufficient; 1 Saund. 347 d, note 6; 2 Saund. 206 a. If a seisin be shown, what must be stated, see 2 Lutw. 1230, 1231. If under a lease, state the seisin in fee of the lessor and the lease, with the profert, and then state the entry as above. As to freehold in right of wife, and pleading title in general, see *ante*, vol. ii. 403 to 427.

(*s*) This is a material and traversable allegation.

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grass there then growing, and doing damage there to the defendant, he the defendant well avows the taking of the said [cattle] in the said place in which &c., and justly &c., as for and in the name of a distress for the said damages so there done and doing as aforesaid. And this &c. [*Conclude with a verification, as ante*, 292.

The like by a tenant from year to year, the lessor being a freeholder. (*t*)

Commencement of avowry or cognizance, as ante, 291.] Because he says, that G. H. before the said time when &c., and at the time of the making of the demise hereinafter mentioned, was seised of and in the said place in which &c. with the appurtenances in his demesne as of fee; and being so (*u*) seised he the said G. H. before the said time when &c., to wit, on &c., demised (*x*) the said place in which &c. (*y*) with the appurtenances to the defendant, to have and to hold the same to the defendant for one whole year thence next ensuing and fully to be complete and ended, and so on from year to year as long as they the said G. H. and the defendant should respectively please; by virtue of which said demise he the defendant afterwards, and before the said time when &c., to wit, on the day and year last aforesaid, entered into the said place in which &c. with the appurtenances, and became and until and at the said time when &c. was possessed thereof, and because the said cattle in the said declaration mentioned at the said time when &c. (*z*) were wrongfully in the said place in which &c. treading down and depasturing the grass there then growing, and doing damage there to the defendant; he the defendant well avows the taking of the said cattle in the said place in which &c. and justly &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this &c. [*Conclude with a verification, as ante*, 292.

The like as a copyholder, or as his tenant.

Commencement of avowry or cognizance, as ante, 291.] Because he says, that the said place in which &c. (*a*) now is and, from time whereof the memory of man is not to the contrary, hath been and still is situate within the manor of &c. [*Here state that the locus in quo was copyhold, and the admission of the copyholder, and the entry of such copyholder, as ante*, 409, *and then state the demise from year to year to the defendant, and the distress damage feasant, as in the preceding form, or if the defendant were tenant under an indenture of lease, state the lease and defendant's entry, as ante*, 395, 396, *and conclude with a verification, as ante*, 292.

Avowry for a distress damage feasant by a freeholder having right of common in the *locus in quo*. The prescriptive right pleaded at *common law*. (*b*)

Commencement of avowry or cognizance, as ante, 291.] Because he says, that before and at the said time when &c. he the defendant was and still is

(*t*) See form, 2 Rich. C. P. 339. It is not sufficient merely to state that the defendant was *lawfully possessed, &c.*, but the seisin in fee and the demise must be stated according to the fact; 2 B. & P. 359; 2 Saund. 284 d, 285. See the mode of stating different seisins in fee and demises by lease, &c. *ante*, vol. ii. 403 to 427, and the Index, "*Title Pleaded.*"

(*u*) The word "so" means in his demesne as of fee, and it amounts to an allegation that G. H. was seised at the time of the demise; *per* Parke, B., *Smith* v. *Adkins*, 8 M. & W. 369.

(*x*) If the demise was by indenture of lease, then state it, and the defendant's entry, as *ante*, vol. ii.

(*y*) See the cases in 6 B. & C. 34; 10 Moore, 264; and *supra*.

(*z*) *Supra*, note.

(*a*) Or a certain part, to wit, —— acres of the said place in which &c.; see 1 Saund. 347 d, note 5.

(*b*) See the several avowries and cognizances indexed in 8 Wentw. cxliv. to cxxvii. and Boote, 237, 238. This form will suffice to show the mode in which an avowry damage feazant by a commoner states the facts, and see 1 Saund. 346, note 2. The different forms of pleading title, *ante*, vol. ii. 403 to 427, and the forms, *post*, in Trespass, will sufficiently enable the pleader to frame any other avowry or cognizance, which may occur in the ordinary course of practice. See Mr. Woolrych's work on Commons, 284 to 308.

Prescriptive right of common.

seised in his demesne as of fee (*c*) of and in a certain messuage and land, with the appurtenances, situate, lying and being in the parish of —— aforesaid, (*d*) and that he the defendant and all those whose estate he now hath, and at the said time when &c. had, of and in the said messuage and land, with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, (*e*) have had, and have been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture in, upon and throughout the said place in which &c. called ——, (*f*) for all his and their commonable cattle (*g*) levant and couchant, (*h*) in and upon the said messuage and land, with the appurtenances, every year, at all times of the year, (*i*) as to the said messuage and

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(*c*) In a plea of this nature the defendant's title must be set out accurately; 4 T. R. 718; Cro. Car. 599; Cro. Jac. 436. At common law, in pleading a right of common by prescription, the defendant must show a *seisin* in fee of the land in respect of which he claims, and prescribe in the *que estate* for the right. But since the stat. 2 & 3 W. 4, c. 71, s. 5, a more succinct mode of pleading or claiming a right of common, way, &c. is permitted, see *ante*, vol. i. 397, and *post*, in trespass. Where a defendant justified under a right of common of pasture, by showing a demise from a freeholder for life of the land in respect of which he claimed, and averred that he, the defendant, and all those whose estate he then had, and his landlord from time &c. had common of pasture in respect of the demised premises, it was held, on demurrer, that the plea was bad; 3 Y. & J. 93.

The quantity and quality of the estate of the claimants should be stated accurately, and where the plaintiff prescribed in a *que estate*, to have common, together with certain tenants of a manor, a demurrer was allowed, because he had not said whose tenants they were, or how many had the right; 2 Lev. 178.

A customary freeholder may plead his right in a *que estate*; 2 Ld. Raym. 1188.

It is not necessary to allege that the defendant was in possession, as that is implied from the allegation of a seisin in fee, until the contrary be shown; 4 M. & Sel. 392; 16 East, 343. It is a rule that where a feoffment is pleaded, it shall be intended to have been by deed; Cro. Car. 482; Cro. Jac. 411.

(*d*) The vill must be stated, and this accurately; see Cro. Jac. 288; 5 T. R. 412; Woolrych, 287.

(*e*) The omission of these words might, it seems, be aided after verdict, 3 T. R. 147; but not on demurrer, *id.*; and see Godb. 347.

(*f*) This seems necessary; see 5 T. R. 412, n.

(*g*) The prescription must be set out accurately and precisely according to the facts. If the entire prescription as stated be not proved, the defendant will fail; see Woolrych on Com. 287, 288. Where a justification was made for common in 500 acres, and it turned out that five of them had been released by an ancestor of the plaintiff, the Court held that the prescription had failed; Noy, Rep. 67. Where the prescription was for one hundred sheep, and the jury found a right for one hundred sheep and six cows, the Court were of opinion the prescription was well stated, Cro. Eliz. 722; but if the finding of the jury had been for one hundred and twenty sheep, and no more of the same kind, it would have been otherwise, *id.* 723; and see *ante*, vol. ii. 612, and notes.

Where a party is possessed, as appurtenant to a messuage, of the sole right of pasturage for sheep on a common, he has no right to feed there the sheep of others, taken "on tack:" therefore on an issue as to such a right of pasturage in the plaintiff, evidence of his having depastured there, unmolested, the sheep of others taken "on tack," though admissible, is not evidence of the right, as it tends to show a usurpation only; *Jones* v. *Richards*, 6 Ad. & E. 530; 1 N. & P. 747; see S. C. 5 Ad. & E. 412.

(*h*) This is necessary; see 1 Saund. 28 a, 5th edit.

(*i*) This must be stated accurately. The statement of a right of common to be at all times of the year, without saying in each year, will be good after verdict; Hutt. 71. If any part of the year be excepted it must be stated accordingly; see 3 Bing. 401.

Where a right was pleaded in respect of a field, which ought to have been open and common on or before the 15th of October, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards, and it was then pleaded, that the plaintiff put in his cattle at a time when the field ought to have been so common as aforesaid, the Court held the prescription bad for uncertainty, for it did not appear from the plaintiff's showing that the corn must necessarily have been cut and carried by the 15th of October, nor even before the end of three weeks after that day; and they said, that although the words "three weeks and upwards" were laid on a *videlicet*, yet that supposing them struck out, there would appear an unqualified length of time, which could not be allowed, and the plaintiff had even omitted to aver that his cattle were put in during the three weeks, and judgment was entered for

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land, with the appurtenances belonging and appertaining. (*k*) And because the said cattle in the said declaration mentioned, at the said time when &c. were in and upon the said place in which &c. called —— depasturing and destroying the grass then there growing and being, and doing damage there, so that the defendant could not have or enjoy his said common of pasture there in so ample a manner as he ought to have had and enjoyed the same, (*l*) he the defendant well avows the taking of the said cattle in the said declaration mentioned in and upon the said place in which &c. called —— and justly &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this, &c. [*Conclude with a verification, as ante, 292.*

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the defendant *non obstante veredicto;* 2 B. & P. 257. It would also have been advisable to have averred that the corn had been cut and carried. So, where the defendant avowed by reason of a right of common, and said that he and all those &c. from time whereof &c. had been accustomed to have, and of right during all the time aforesaid ought to have had, and still of right ought to have, common of pasture in the *locus in quo*, there was a demurrer setting forth the uncertainty of such a prescription, that it did not appear whether the defendant had common every year, or at what period of the year, and therefore that it was not clear that the defendant had any right at all, and the Court held the avowry bad, but gave leave to amend; 2 B. & P. 359. It is said, that if A. be seised of twenty acres, to which common is appendant, and enfeoff B. of ten acres, B. must prescribe specially, to wit, that A. had common appendant to the whole till such a day, and then B. purchased, after which he put in his beasts according to due apportionment; 4 Rep. 37; see Woolrych, 288, 289.

(*k*) As to this, see 1 Saund. 346 c.

(*l*) This seems necessary; see 1 Saund. 346 c; 3 Lev. 104; *sed vide* Styles, 428.

XIV. PLEAS IN BAR IN TRESPASS.

GENERAL RULES AS TO PLEADINGS IN TRESPASS.

Reg. Gen. Hil. Term, 4 W. 4.

V. In Trespass.—1. In actions of trespass *quare clausum fregit*, the close or place in which &c. must be designated in the declaration by name or abuttals, or other description, in failure whereof the defendant may demur specially, Abuttals to be stated in declaration.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially. Effect of not guilty in trespass *qu. cl. fr.*

3. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein. In trespass *de bon. asp.*

4. Where, in action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified. Right of way.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.*, horses, sheep, oxen and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff in respect of the trespasses which shall not be so justified. Common of pasture.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively. Similar pleas.

Provided nevertheless, that nothing contained in the 5th, 6th or 7th of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of Easter Term next. Commencement of the rules.

I. IN GENERAL.

General issue, not guilty. (*a*)

In the Queen's Bench, [*or* "C. P." *or* "Exchequer."]

The —— day of ——, A. D. ——.

D. ats. B. } And the defendant, by E. F. his attorney, says, that he is not guilty of the said alleged trespasses (*b*) above laid to his charge, or of any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant puts himself upon the country, &c.

General issue by statute.

Same as the last form, inserting the words "by statute" in the margin of the plea.

The like, by several defendants.

And the defendants, by E. F. their attorney, say, that they are not, nor is any or either of them, guilty of the said alleged trespasses above laid to their charge, or of any or either of them, or any part thereof, in manner and form as the plaintiff hath above complained against them. And of this the defendants put themselves upon the country, &c.

The ancient mode of pleading not guilty as to part, as the force and arms, &c. and specially to the residue. (*c*)

And the defendant, by E. F. his attorney, as to the coming with force and arms, &c. and whatever else is against the peace of our lady the now queen, (*d*) and as to all the alleged trespasses in the said declaration mentioned, except as to the breaking and entering the said close called &c. and the said other close called &c. in the said first and second counts of the said declaration

(*a*) See form, 1 Rich. C. P. 148; Plead. A. 400. Even before Reg. Gen. Hil. T. 4 W. 4, very few matters of defence could be given in evidence under this plea, which in general merely puts in issue the facts stated in the declaration. In trespass for injuries to the person, matters in justification or excuse must be pleaded specially; see *Hall* v. *Fearnley*, 3 G. & D. 10; and in trespass to personal property the same rule prevails, except in the instance of a distress for rent, which, when made upon the demised premises, *may* be given in evidence under the general issue, by 11 Geo. 2, c. 19, s. 21; 1 Esp. Rep. 257. In trespass to *real* property, the defendant might, under this plea, give in evidence his right of possession of the *locus in quo*, or that of any other person under whom he justifies; 7 T. R. 354; 8 T. R. 403. Rights of way and other easements must always have been pleaded specially. As to to this plea in general, see *ante*, vol. i. Index, "*General Issue.*" The 3 & 4 W. 4, c. 42, empowering the judges to make new rules in pleading, contains (sect. 1,) an express reservation of the right to plead the general issue and give the special matter in evidence *where authorised by statute*, and Reg. Gen. Hil. T. 4 W. 4, repeats that exception; and accordingly, in trespass for building upon and heightening plaintiff's wall, defendant is at liberty under the general issue to show that the wall is a party wall, and that he acted *bonâ fide* under the Building Act, 14 Geo. 3, c. 78, s. 43, so as to entitle himself to notice of action under sect. 100 of that act; *Wells* v. *Ody*, 2 Cr. M. & R. 128, 130, 133. See also *Neale* v. *M'Kenzie*, 1 Cr. M. & R. 61, where the Court refused to allow a party, entitled by statute to plead the general issue and give the special matter in evidence, to plead such a plea and also a special plea of justification. See also *Ross* v. *Clifton*, 1 G. & D. 72; *Legge* v. *Boyd*, 1 M. & G. 898.

(*b*) On a plea to a declaration for an assault and battery and tearing clothes, that the defendant was not guilty of the said supposed *assaults in manner and form* as the plaintiff hath above complained, &c. it was held that the *modo et formâ* included a denial of the battery and *laceravit* as well as the assault; 3 Bingh. 135; 10 Moore, 502, S. C.

(*c*) See a form, Plead. A. 485. Before the statute 4 Ann. c. 16, which first allowed several pleas in Courts of *record*, by leave of such Courts, it was the usual mode of pleading, where the defendant could not justify all the trespasses mentioned in the declaration, 1 Saund. 10, 24, 82, 296; and where the defendant may not be able to obtain leave to plead double, or may wish to prevent the plaintiff's counsel from having the reply at the trial, this mode may still be adopted, 3 Campb. 366, 368; so, in order to save costs, it is frequently advisable to confine the plea of "not guilty" to the trespasses which can be justified, leaving the plaintiff at liberty to take judgment and execute a writ of inquiry as to the trespasses which cannot be justified, as in 2 East, 88.

(*d*) This denial of the trespass and breach of the peace is to save a fine to the queen; *per* Bayley, J. 2 Stark. 518.

In General.

mentioned, and in which &c. and the several trespasses alleged to have been committed by the defendant therein, says, that he is not guilty thereof in manner and form as the plaintiff hath above thereof complained against him. And of this he puts himself upon the country, &c. And as to residue of the said alleged trespasses in the said declaration mentioned, the defendant saith, that the plaintiff ought not to maintain his aforesaid action thereof against him, because he saith, &c. [*Here state the subject-matter of the defence, and conclude as usual.*

Accord and satisfaction.

The plea of accord and satisfaction in trespass is similar to that in case, *ante*, 248, adopting the term "trespasses" instead of "grievances." See also the pleas, 5 East, 294. It is necessary to plead specially; 3 Burr, 1353; 1 Bla. Rep. 388, S. C.

By one defendant in an action against two, accord and satisfaction by the other, after action brought. (*e*)

And for a further plea in this behalf, the defendant W. P. says, that the plaintiff ought not further to maintain his aforesaid action thereof against him the defendant W. P., because he says, that the said alleged trespasses were committed by the said W. P. jointly with the defendant G. S. [and by his command], and that after the committing of the said several alleged trespasses in the said declaration mentioned, and after the commencement of this suit, and before the day of pleading this plea, to wit, on &c. [*day of accord, or about it,*] it was agreed between the plaintiff and the defendant G. S., that the said G. S. should pay to the plaintiff, and the plaintiff should receive, a certain sum, to wit, the sum of £——, [*the sum paid*] in satisfaction and discharge of the said alleged trespasses, and of all damages by the plaintiff sustained by reason of the committing thereof, and of all costs by the plaintiff sustained and incurred in prosecuting the said action against the defendants; and the said W. P. further saith, that in pursuance of such agreement, the said G. S. then paid to the plaintiff the said sum of £——, and the plaintiff then accepted the same in full satisfaction and discharge of the said alleged trespasses, and of all such damages and costs as aforesaid. And this he the defendant W. P. is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action thereof against him, &c.

Plea of arbitrament and award. (*f*)

As to the plea of arbitrament, and form and law, see *ante*, 105, in assumpsit, which may be easily adapted to trespass.

Plea of release.

A *release* must be specially pleaded; see 3 Burr. 1353; see form, *ante*, 112.

Judgment by verdict recovered by plaintiff against defendant for same trespasses. (*g*)

And for a further plea in this behalf, the defendant says, that the said plaintiff, heretofore, to wit, on the —— day of ——, A. D. ——, in the Court of our said lady the queen, before the queen herself, [*or if in C. P.* "before Sir N. C. Tindal, knight, and her majesty's justices of the bench,] at Westminster, in the county of Middlesex, by the writ of our said lady the

(*e*) See form of accord and satisfaction before action, *Thurman* v. *Wilde*, 11 A. & E. 453; 3 P. & D. 289, S. C. See a plea in assumpsit, of payment after action brought, *ante*, 100; and 5 B. & Ald. 886.

(*f*) See the form of plea and law in assumpsit, *ante*, 100.

(*g*) See plea of judgment recovered in assumpsit, *ante*, 107, and the notes there as to the form and pleas which should be attended to. This defence cannot in trespass be given in evidence under the general issue; see a replication, denying the judgment to be for the *same trespasses, post*. Trespass is the proper

IN GENERAL.

Judgment signed the —— day of ——, A. D. ——. (*h*)

queen, impleaded the defendant in an action of trespass for the committing the very same alleged trespasses in the said declaration above mentioned, whereupon the defendant afterwards, to wit, on &c. pleaded that the defendant was not guilty of the said trespasses, or any or either of them, and issue was thereupon joined upon the said plea between the plaintiff and the defendant; and thereupon afterwards, to wit, at the assizes holden in and for the county of Surrey, on &c. [*commission day, or about it*], the said issue came on to be tried, and was then tried in due course of law, by a jury of the country, duly summoned, chosen and sworn in that behalf, between the plaintiff and the defendant, which jury, upon the said trial, then upon their oaths found that the defendant was not guilty of the said trespasses, or any or either of them, in manner and form as the plaintiff in his said declaration in that behalf complained against him. And such proceedings were thereupon had in the said Court in that plea and suit last aforesaid, that afterwards, to wit, on the —— day of ——, A. D. ——, it was considered in and by the said Court, that the plaintiff should take nothing by his said writ and declaration in that suit, but that he and his pledges to prosecute should be in mercy, &c. and that the defendant should go thereof without day, &c. And it was further considered by her majesty's Court there, that the defendant should recover against the plaintiff £——, for his costs and charges by him laid out about his defence in that behalf, by the Court of our said lady the queen, now there adjudged to the defendant, and with his assent, according to the form of the statute in that case made and provided, and that the defendant should have execution thereof &c. As by the record and proceedings thereof still remaining in the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid, more fully and at large appears; which said judgment still remains in full force and effect, not in the least reversed or made void. And this the defendant is ready to verify by the said record.

Plea justifying trespass under a fiat of bankruptcy.

Under the former statutes, 13 Eliz. c. 7, and 1 Jac. 1, c. 15, s. 16, a form of plea was given for a defendant to plead in an action against him for any thing done under those acts, under a commission of bankruptcy issued against a party; but a special plea is no longer necessary, as the 6 Geo. 4, c. 16, s. 44, allows the defendant, in such case, to *plead the general issue*, and give that act and the special matter in evidence on the trial, and that the matter was done under the authority of that act. See the cases in 5 Bing. 270; 8 Bar. & Cres. 697. See the several works of Eden, Cullen, Montague and Archbold. A second commission of bankruptcy is void while a prior one remains in force: to a replication in trespass, therefore, asserting a title to goods under a first commission still in force, it is ill for a defendant who

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remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation; and a recovery, with satisfaction for erecting it, does not operate as a purchase of the right to continue such erection, and therefore, where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into Court in full satisfaction of the trespass; it was held, that after notice to the defendants to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar; *Holmes* v. *Wilson*, 10 A. & E. 503.

(*h*) See marginal note, *ante*, 106.

claims under a second commission to rejoin that the goods were in the order and disposition of the plaintiff by the permission of the assignee under the fiat or first commission, and that they passed to the defendant by the assignment under the second; *Nelson* v. *Cherrell*, 7 Bing. 663; 5 M. & P. 680, S. C. Taking goods, pleas and replication, and law, *Jones* v. *Brown*, 1 Hodges, 33; 1 Bing. N. C. 484, S. C.

In trespass for breaking and entering the dwelling-house and garden of the plaintiff, and making a great noise and disturbance therein &c., whereby the plaintiff and his family were greatly harassed, disturbed and annoyed in the peaceable possession of the dwelling-house &c., the defendant pleaded, that after the trespass, and after the commencement of the suit, the plaintiff had become bankrupt, and one W. P. was appointed assignee, whereby and by virtue of the statutes &c. the said causes of action vested in the said W. P.; and it was held on general demurrer that the plea was bad; *Spence* v. *Rogers*, 11 M. & W. 191. *Quære*, whether it would have been good if it had been shown that the *locus in quo* passed to the assignees; *id. ibid.* And where to trespass for breakiug and entering the plaintiff's dwelling-house and seizing his goods under a false claim of debt, whereby the plaintiff was deemed insolvent, and certain lodgers left his house, a plea as to seizing the goods that the plaintiff was bankrupt, was held bad in substance, inasmuch as the plaintiff might recover damages beyond the value of the goods; *Brewer* v. *Dew*, 1 D. & L. 383.

Plea of tender by officer of excise or customs. (i)

And the defendant for a further plea, [as to the breaking and entering the said dwelling-house, warehouse, and shops of the plaintiff in the [first] count of the said declaration mentioned, and then making the said noise and disturbance therein, and staying and continuing therein making such noise and disturbance for the space of time in that count mentioned, and during all that time disquieting and disturbing the plaintiff in the quiet and peaceable possession and enjoyment of the said dwelling-house, warehouse, and shops, and then forcing open, breaking open, spoiling, breaking down, breaking to pieces the boxes, trunks, drawers, desks, bureaus and book-cases, and breaking to pieces, spoiling, and destroying the said bolts, bars, chains, hinges and fastenings, and throwing about, tumbling, dirtying, damaging, breaking to pieces, spoiling and destroying the said furniture, stock in trade as a linen-draper, goods, wares, and merchandize of the plaintiff, then being and found in the said dwelling-house, warehouse, and shops in the said [first] count of the said declaration mentioned, and also as to the breaking and entering the said dwelling-house of the plaintiff in the said [second] count of the said declaration mentioned, and then making the said noise, disturbance and affray therein, and then forcing open, breaking open, and spoiling the said other boxes, trunks, drawers, desks, bureaus, and book-

(i) By the 7 & 8 Geo. 4, c. 53, s. 116, an officer of excise, or any person employed in the revenue of the excise, or any person acting in the aid and assistance of such officer or person, may tender amends within one month after notice of action given, (as required by the 114th section of that act,) and he may plead it in bar if not accepted. By the 117th section the defendant may, if he has neglected to tender amends, or has not tendered sufficient amends, pay money into Court before issue joined.

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cases of the plaintiff in the said [second] count of the said declaration mentioned, above supposed to have been done by the defendants, they the defendants (*k*) say, that before and at the time of committing the said trespasses, they the said W. and S. were respectively officers of and belonging to the customs of our said lady the queen, acting under the authorities and powers to them given by the several statutes made and now in force for seizing the duties of the customs. And they the said J. J. W. and J. C. were respectively officers of and belonging to the excise of our said lady the queen, and aiding and assisting the said W. and S. as such officers as aforesaid; and that the said several trespasses in the said declaration mentioned, whereof and for which the plaintiff hath brought his action in that behalf against the defendants, were done by the said W. and S. in the execution of their said offices under the said authorities and powers, and long after the same offices respectively granted to them, and by the other defendants, as such assistants of the said W. and S. as aforesaid, and by their order and in their aid and in execution, and by reason of their offices as officers of excise as aforesaid; and that after the committing of the said trespasses, to wit, on the —— day of —— and not before, (*l*) a notice in writing that the plaintiff intended to commence and prosecute, in the Court of our said lady the queen of her Exchequer, an action of trespass against the defendants for the same trespasses, was given and delivered to each of them the defendants, according to the form of the statute in such case made and provided, by D. B. who was then the attorney of the plaintiff in that behalf. And the defendants further say, that they the defendants afterwards, and within one calendar month next after such notice given to them respectively as aforesaid, to wit, on the day and year last aforesaid, tendered to the plaintiff the sum of £—— as and for amends for the said several trespasses, and which was then sufficient amends for the said trespasses, (*m*) and that one R. J. for and on behalf of the defendant, tendered to the [said D. as the attorney of the] plaintiff, the sum of £—— as and for the costs of the said notice so given as aforesaid and which was then a sufficient sum in that behalf; but the plaintiff and the said attorney of the plaintiff respectively did not then accept the same sums of £—— and £——, so tendered to them respectively as aforesaid, but then severally and respectively wholly refused to accept and receive the same from the defendants or from the said R. J. on behalf of the defendants. And this the defendant is ready to verify, &c.

Tender of amends by a justice of the peace, under 24 Geo. 2, c. 44, s. 2. (*n*)

And for a further plea in this behalf, [as to (*o*) the said assaulting, beating,

(*k*) The recital of the trespasses intended to be justified must depend on the circumstances of the case. In some cases the whole trespasses, as stated in the declaration, may be justified, and then this recital is unnecessary.

(*l*) Vide the 7 & 8 Geo. 4, c. 53, s. 116.

(*m*) The original plea omitted this allegation; but it seems necessary.

(*n*) The statute also authorizes the plea of general issue. As to this plea in general, see Bac. Ab. Tender, P. 6, and the precedents, 9 Wentw. Index, cxxxii.; 3 Burn's J. 26th edit. 495, 496. In another precedent it was thought to be advisable in a third plea to plead the tender of the 20s. mentioned in the act for the preparing and serving the notice of action, together with the sum tendered as amends for the trespass. It is not necessary that the party who pleads a tender under this statute should bring the money into Court; Bac. Ab. Tender, P. 6. See a plea under the 43 Geo. 3, c. 141, 1 Marsh. 220.

(*o*) Sometimes the whole of the trespasses, as stated in the declaration, are justifiable, and then this confinement of the justification to part of the alleged trespasses is not necessary.

and ill-treating the plaintiff and imprisoning him, and keeping and detaining him in prison for the said space of time in the said declaration mentioned, by the defendant above alleged to have been done &c., he the defendant says, that the defendant at the said time when &c., was and long before had been a justice of our lady the now queen, assigned to keep the peace of our said lady the queen, in and for the said county of ——, and also to hear and determine divers felonies, trespasses, and other misdemeanors done and committed within the said county. And the defendant further says, that the said trespasses in the said declaration mentioned, were done and committed by the defendant in the execution of his said office of justice of the peace within the said county, after the 24th day of June, 1751, and that the defendant, after the committing of the said trespasses by him above alleged to be done, and before the commencement of this suit, and within one calendar month next after any notice in writing given of any writ or process intended to be brought against the defendant by the plaintiff for the cause aforesaid, as required by the statute in such case made and provided, that is to say, on the —— day of ——, A, D. ——, tendered and offered to pay to the plaintiff a certain sum of money, to wit the sum of £——, as and for amends for the said trespasses, which said sum of £—— so tendered and offered as aforesaid, was sufficient amends for the said trespasses, and which said sum of £—— so tendered in amends for the said trespasses, the plaintiff then wholly refused to accept and receive. And this the defendant is ready to verify, &c.

Plea of disclaimer of title to *locus in quo*, and tender of amends. (*p*)

And for a further plea in this behalf, the defendant says, that he the defendant, at the said times when &c., had not nor claimed to have, nor hath he nor doth he now claim to have, but disavoweth and disclaimeth to have any title or interest in the said closes in which &c.; and the defendant further saith, that the said cattle in the said declaration mentioned, a little before any of the said times when &c., had, without the knowledge and against the will of the defendant, strayed and escaped into the said closes of the plaintiffs in which &c. and at the said times when &c. were in the said closes, in which &c. doing damage there as in the said declaration is mentioned; wherefore he the defendant, as soon as he had knowledge thereof, to wit, at the said several times when &c., in order to prevent further damage there to the plaintiff, and to drive his said cattle out of the said closes, entered the said closes in which &c. by the most convenient and proper ways there, for the purpose of driving the said cattle out of the said closes, and then at the said times when &c. did drive them out of the said closes of the plaintiff

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(*p*) See precedents, 9 Wentw. Index, cxxxii. In trespass to land this plea is given by the 21 Jac. 1, c. 16, s. 5. See the cases thereon, Com. Dig. Pleader, 3 M. 36; Vin. Ab. Trespass, S. a. 542; Bac. Ab. Tender, P. 8. It should seem that a tender of amends cannot be pleaded for any other trespasses than those committed by cattle; see 3 Lev. 37; Stra. 549; and Vin. Ab. Trespass, S. a. 542.

See form of plea and replication thereto, *Williams* v. *Price*, 3 Bar. & Adol. 695, *post*. Where cattle are distrained damage feasant and put into a sufficient pound, and escape without *default or neglect* of distrainor, he may bring trespass for the damage, and although the defendant plead that the cattle were taken damage feasant and impounded, and escaped without *his* default, a *replication* stating that the distress was put into a proper pound, and escaped without neglect or default of the plaintiff, is a sufficient answer; *id. ibid.*

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in which &c. by the most proper and convenient ways there as it was lawful for him to do, he doing as little damage on those occasions as he possibly could; and in so doing, he the defendant with his feet in walking necessarily and unavoidably trod down, trampled upon, consumed, and spoiled a little of the oats of the plaintiff there then growing and being; which are the same trespasses in the said declaration mentioned, and whereof the plaintiff hath above thereof complained against the defendant. And the defendant further saith, that after the committing of the said several trespasses, and before the commencement of this suit, to wit, on &c. [*day of tender or about it,*] the defendant tendered and offered to pay to the plaintiff the sum of £——, in full satisfaction of the said several trespasses in the said declaration mentioned, the said sum of £—— then being sufficient amends for the said trespasses, which said sum of money the plaintiff then wholly refused and still doth refuse to accept of the defendant. And this the defendant is ready to verify, &c.

Statute of limitations. (q)

And for a further plea in this behalf, the defendant saith, that he the defendant was not guilty of the said several trespasses in the said declaration mentioned, or of any or either of them, or of any part thereof, in manner and form as the plaintiff hath above thereof complained against him, at any time within six [*or in an action of trespass to the person* "four"] years next before the commencement of this suit. And this the defendant is ready to verify, &c.

Plea of payment into Court of a sum of money in satisfaction of damages for trespass in a house. (r)

See *Bird* v. *Cooper*, 4 Dowl. 148; and *ante*, 104, in Assumpsit; and *ante*, 277, in Case.

To Persons.

II. TO PERSONS.

Son assault demesne. (s)

D. ats. B.

And for a further plea in this behalf, [as to the said assaulting, beating, bruising, wounding (t) and ill-treating the plaintiff, [as in the said *first* count of the said declaration mentioned,] and as to

(q) 21 Jac. 1, c. 16, s. 3. See observations on this statute, 6 East, 390; 1 Chit. Col. Stat. 700. An *acknowledgment* of a trespass not committed within six years will not take the case out of the statute; 1 B. & Ald. 92; 2 Chit. Rep. 249.

(r) Where to part of the trespasses stated in a declaration, the defendant pleaded a justification, and also (irregularly) pleaded to *all* the trespasses, payment of money into Court, and *non damnificatus ultra*, to which the defendant replied *damnificatus ultra*, and the jury found a verdict for the defendant upon the justification, and for the plaintiff 20*s.* damages *ultra*, it was held to be no objection to the verdict as to the 20*s.* that it must be taken to apply, in part, to the trespasses justified; *Thompson* v. *Jackson*, 3 M. & G. 621.

(s) As to this plea, see Com. Dig. Pleader, 3 M. 15, and the precedents, 9 Wentw. Index, cxxi. to cxxiii.; 1 Rich. C. P. 150; 2 Rich. C. P. 56; Plead. Ass. 147; Trem. 269, 270; Petersdorff's Prec. 48. A plea of *son assault demesne*, beginning "and for a further plea *in this behalf*," and alleging that "just before the said time when &c." plaintiff assaulted defendant and would have beaten him if he had not immediately defended himself &c., "wherefore he the defendant did then *defend himself* against the plaintiff" &c., and that "*if any hurt or damage then happened or was occasioned*" to

the rending, tearing, damaging and spoiling the wearing apparel of the plaintiff, [as in that count also mentioned,]] the defendant saith,* that the plaintiff just before the said time when &c. [in the said first count mentioned], to wit, on the day and year in that count mentioned, with force and arms &c. made an assault (*u*) upon the defendant, and would then have beat, bruised and ill-treated the defendant, if he had not immediately defended himself against the plaintiff; wherefore he the defendant did then defend himself against the plaintiff, as he lawfully might for the cause aforesaid, and in so doing did *necessarily and unavoidably* (*x*) [a little beat, bruise, wound and ill-treat the plaintiff, and rend, tear, damage and spoil the said wearing apparel [in the said first count mentioned]] *doing no unnecessary damage to the plaintiff on the occasion aforesaid;* [and so the defendant saith, that all the hurt and damage that then happened to the plaintiff, and his said wearing apparel, were occasioned by the said assault so made by the plaintiff on him the defendant, and in the necessary defence of himself the defendant against the plaintiff]; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above complained against him the defendant. And this the defendant is ready to verify, &c.

Plaintiff's first assault.

Defendant's self-defence.

And for a further plea in this behalf, [as to the said assaulting, beating, bruising, wounding and ill-treating the plaintiff, as in the said first count of

Molliter manus imposuit, to preserve the peace, whereupon plaintiff made an assault on defendant, who defended himself. (*y*)

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the plaintiff, the same happened and was occasioned by the assault of the plaintiff on defendant and in the necessary defence &c., was held good on special demurrer, as it sufficiently confessed an assault and battery; and that the hypothetical averment, "if any," &c. relating merely to "hurt or damage," not to the fact of an assault, the form was no ground of objection; *Wise* v. *Hodsoll*, 11 A. & E. 816; 3 P. & D. 510, S. C.

(*t*) The statement of the trespasses in the introductory part of the plea will necessarily depend upon the form of the declaration, and in many cases it may be wholly unnecessary. In a plea of *son assault demesne* a *wounding* may be justified in self-defence in the above form; but where the law *primâ facie* only authorizes an arrest, or touching a person by a *molliter manus imposuit*, if a wounding also be attempted to be justified, the occasion thereof must be specially stated, as in the case of an arrest under process a resistance or attempt to rescue must be stated, as in 1 Saund. 296, 297, note 1; 8 T. R. 78, 299. In defence of the person of the defendant, an assault and battery &c. may be justified, (2 Salk. 642; 1 Ld. Raym. 177; Bul. N. P. 7th edit. 18; 7 Moore, 35,) but in defence of the possession of personal or real property, the defendant must plead *molliter manus imposuit*; see the distinction, 1 Salk. 407; Lutw. 1483; 8 T. R. 78; Com. Dig. Pleader, 3 M. 15. It seems clear the defendant cannot in any case justify an actual *beating* and *wounding*, unless he shows in his plea that force was used or attempted on the part of the plaintiff, but still he may justify the *beating*, that is to say, what in law amounts to a *battery*, by way of *molliter manus imposuit*, for it was held, in 6 T. R. 562, that a justification of "assaulting, seizing and grasping the plaintiff," in a vestry room, amounted to a justification of a battery within the meaning of 22 & 23 Car. 2, c. 9, as to costs. So also in 7 Taunt. 689; 1 Moore, 420, S. C., a justification of ill-treating by way of *molliter manus imposuit* admitted a battery, and see Willes, 14; and see 1 Saund. 5th ed. by Patteson and Williams, 296, l. (a). How to reply to such plea, see Carth. 280; 1 Salk. 407; Skin. 387; and see 2 Bla. Rep. 1165.

(*u*) State the assault or battery, &c. made by the plaintiff upon the defendant, according to the facts.

(*x*) This, together with the averment that the trespasses are the same as those complained of in the declaration, according to many of the entries, do not appear to be necessary; see the precedents, Winch. 1121; Co. Ent. 644; 2 Saund. 5, which merely state that the supposed injury was occasioned by the plaintiff's first assault, and in self-defence, and conclude with a verification. It should seem that it would suffice to say, "and in so doing did commit the said alleged trespasses in the said declaration or said count mentioned;" or "in the introductory part of this plea mentioned."

(*y*) See the notes to the form *supra*. The plea of *son assault demesne* might in such case be insufficient, because the defendant's first interference to preserve the peace would, in point of fact, render him the first assaulter, though justifiably.

To Persons. the said declaration mentioned, (*z*)] the defendant saith, that [*here state the molliter manus imposuit to preserve the peace, as in the forms infra to the* †, *and then proceed as follows:*] Whereupon the plaintiff then with force and arms &c. made an assault upon the defendant, and would then have beat, bruised and ill-treated him the defendant, if &c. [*State the self-defence &c. and conclude as in the above form.*

Son assault in defence of a father, &c. (*a*)

Proceed as in the form, ante, 319, *to the asterisk, and then as follows:*] That the plaintiff, just before the said time when &c. in the said [first count mentioned], to wit, on the same day and year in that count mentioned, with force and arms &c. made an assault upon E. F. then being the [father] of the defendant, and *would* (*b*) then have beat, bruised and ill-treated him the said E. F. if he the defendant had not *immediately* defended the said E. F., wherefore he the defendant did then defend the said E. F. so then being his [father] as aforesaid, against the plaintiff, as he lawfully might for the cause aforesaid, and in so doing did necessarily and unavoidably [a little beat, bruise, wound and ill-treat the plaintiff, and rend, tear, damage and spoil the said wearing apparel in the said first count mentioned, (*c*)] doing no unnecessary damage to the plaintiff on the occasion aforesaid, and so the defendant says, that the said alleged hurt and damage that then happened to the plaintiff and his said wearing apparel, were occasioned by the said assault so made by the plaintiff upon the said E. F. and in the necessary defence of the said E. F. against the plaintiff. Which are the same alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above thereof complained against the defendant. And this the defendant is ready to verify, &c.

Molliter manus to preserve the peace, plaintiff and a third person being fighting together. (*d*)

And for a further plea in this behalf, [as to the said assaulting, beating and ill-treating the plaintiff, as in the said first count mentioned, (*e*)] the defendant says,* that the plaintiff and one E. F., at the said time when &c. were fighting together, and striving with force and arms to beat and wound each other, against the peace of our lady the now queen; whereupon the defendant being then present, for the preservation of the peace of our said lady the queen, and that the plaintiff and E. F. might do no hurt to each other, and in order to separate and part them, then gently laid his hands upon the plaintiff, as he lawfully might for the cause aforesaid,† which are the said [assaulting, beating and ill-treating the plaintiff, in the said first

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(*z*) This enumeration of the trespasses intended to be justified must depend upon the statements in the declaration, and in many cases it may be wholly unnecessary.

(*a*) As to the pleas of this nature, see Com. Dig. Pleader, 3 M. 15; 1 Burn, J., "*Assault.*" By inserting the words "wife," "mother," "son," "daughter," "servant," or "master," according to the fact, instead of the word "father," this form may be readily applied to any case that may arise; see the precedent, Winch. Ent. 1121; 9 Wentw. Index, cxxi. to cxxiii.

(*b*) 2 Stra. 953.

(*c*) Or, instead of these words, say, "commit the said several alleged trespasses in the introductory part of this plea and the said declaration mentioned."

(*d*) See the notes to the precedent, *ante,* 319. As to this plea, see Com. Dig. Pleader, 3 M. 16, and the forms, 2 Bro. Ent. 137; 2 Rich. C. P. 56; 9 Wentw. Index, cxviii.; and see plea in *Scruton* v. *Taylor,* 8 Dowl. 110.

(*e*) This enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in some cases may be wholly unnecessary.

count of the said declaration mentioned, (*f*)] and whereof he the plaintiff hath above thereof complained against him the defendant. And this the defendant is ready to verify, &c.

The like, stating that the plaintiff made an assault upon a third person. (*g*)

Same as the above to the asterisk, and then as follows:] That the plaintiff, just before the said time when &c. in the said first count mentioned, to wit, on the day and year in that count mentioned, with force and arms &c. had made an assault upon one E. F. and was then and at the same time when &c. beating and ill-treating the said E. F. in breach of the peace of our said lady the queen; wherefore the defendant, at the said time when &c. to preserve the peace of our said lady the queen, and to part the plaintiff from, and to prevent him from further beating and ill-treating the said E. F., gently laid his hands upon the plaintiff, as he lawfully might for the cause aforesaid,† which are the same [assaulting, beating and ill-treating the plaintiff in the said first count of the said declaration mentioned, (*h*)] and whereof the plaintiff hath above thereof complained against the defendant. And this the defendant is ready to verify, &c.

Correction of an apprentice for disobedience. (*i*)

And for a further plea, as to the said assaulting, beating and ill-treating the plaintiff, the defendant says, that before and at the said time when &c. in the said [first count] mentioned, the plaintiff was the apprentice of the defendant in his trade and business of a ——, and then behaved and conducted himself saucily and contumaciously towards the defendant, and then refused to obey his lawful commands relating to his duty as such apprentice, whereupon he the defendant then moderately corrected him the plaintiff for his said misbehaviour. Which are the said assaulting, beating and ill-treating the plaintiff in the said declaration mentioned. And this the defendant is ready to verify, &c.

Moderate correction of a seaman. (*k*)

And for a further plea in this behalf, [as to the making of the said assault on the plaintiff, in the said declaration mentioned, and beating, bruising and ill-treating him, and putting the said iron shackles upon the hands of the plaintiff, and imprisoning him for the space of time in the said declaration mentioned, (*l*)] the defendant saith, that he the defendant, before and at the said time when &c. in the said first count mentioned, was the master and

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(*f*) Or, instead of these words, say, "alleged trespasses in the introductory part of this plea and in the said declaration mentioned."

(*g*) See the note to the preceding form.

(*h*) Or, instead of these words, say, "alleged trespasses in the introductory part of this plea and in the said declaration mentioned."

(*i*) As to this plea, see Com. Dig. Pleader, 3 M. 19; 1 Bla. Com. 450; Burn, J. "*Apprentice.*" See the forms, Bro. Ent. 219. See the necessity for pleading this matter specially, 2 B. & P. 224.

(*k*) As to the necessity for pleading this ground of defence specially, see 2 B. & P. 224. It may frequently be advisable to plead the facts more specially, see the form, 9 Wentw. 365; 2 Rich. C. P. 47, 51; see form of plea and law in *Murray* v. *Montriou*, 6 Car. & P. 471; *Lamb* v. *Burnett*, 1 Tyr. 265; 1 Crom. & Jerv. 291; *Johnson* v. *Budge*, 3 Dowl. 207; 1 Chitty's Gen. Prac. 734. As to pleas of moderate correction in general, see Com. Dig. Pleader, 3 M. 19. The Mutiny Acts allow a defence of this nature, in the case of disobedience of a soldier, &c. to be given in evidence under the general issue. In such a case, if the plaintiff were found guilty of disobedience by a court-martial, and the defendant relies on it in his defence as a matter of estoppel, he should plead it specially; see 2 C. & P. 148.

(*l*) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases is wholly unnecessary.

To Persons.

commander of a certain ship or vessel called the ——, and the plaintiff then was a mariner in and belonging to the said ship or vessel, and the defendant further saith, that the plaintiff, just before the said time when &c., neglected his duty as such mariner as aforesaid in and on board of the said ship or vessel, and behaved and conducted himself in a mutinous, disorderly and improper manner on board thereof; whereupon the defendant, so being master and commander of the said ship or vessel as aforesaid, for the preservation of discipline and order in and on board thereof, at the said time when &c., did moderately chastise and correct the plaintiff for his said neglect of duty and misconduct, and in so doing did necessarily and unavoidably [a little beat, bruise and ill-treat the plaintiff; and for the same purpose he the defendant did then put the said iron shackles upon the hands of the plaintiff, and did imprison him for the space of time in the said declaration mentioned, as it was lawful for him to do for the cause aforesaid, which are the same alleged trespasses in the introductory part of this plea mentioned, (*m*)] and whereof the plaintiff hath above thereof complained against the defendant. And this the defendant is ready to verify, &c.

To a declaration for assault and battery, that defendant was convicted of the same before two justices, under the 9 Geo. 4, c. 31, ss. 27, 28, and therefore defendant released from action. (*n*)

And for a further plea in this behalf as to the [*confine the commencement to the trespass mentioned in the declaration intended to be justified, if all are not so,*] said several alleged trespasses in the said declaration mentioned, [except as to the rending, tearing and damaging the clothes and wearing apparel therein mentioned,] the defendant says, that the said several alleged trespasses in the said declaration mentioned [except as aforesaid] were committed after the passing and commencement of a certain act of parliament made and passed in the ninth year of the reign of his late Majesty King George the Fourth, intituled "An Act for consolidating and amending the Statutes in England relative to Offences against the Person;" and that such offences amounted to no more than a common assault and battery within the meaning of that act, and that after the commission of such trespasses, to wit, on the day and year aforesaid, upon the complaint of the plaintiff before then made by him of the said trespasses, according to the said statute, the defendant was brought before J. D., Esq., and S. P., Esq., then being justices of our lady the queen, assigned to keep the peace of our said lady the queen in and for the said county of Kent, (*o*) and to hear and determine misdemeanors therein committed,* and was by them the said justices, so being such justices, on the prosecution and at the instance of the plaintiff, convicted of the said trespasses in the said declaration mentioned, except as aforesaid, and by them adjudged for such trespasses to forfeit and pay a certain fine and sum of money, to wit, the sum of *2s. 6d.*, to be paid by him to E. F. and to be by him applied according to the directions of the statute in that case made and provided; and the defendant was also then in the preceding matter aforesaid by the said justices adjudged to pay the sum of —— shillings for costs, and that the same should be paid to the plaintiff; and the

(*m*) Or, instead of these words between brackets, say, "commit the said alleged trespasses in the introductory part of this plea mentioned, and in the said declaration mentioned."

(*n*) See the clauses and notes, Burn, J. 28th edit. "*Assault.*"

(*o*) If this accords with the venue in the declaration, it appears sufficiently that the assault was committed in the same county, so as to give jurisdiction to such justices; *Sloss* v. *Davis*, 2 P. & D. 560.

defendand did afterwards, to wit, on the day and year aforesaid, pay the whole amount of the monies so adjudged to be paid as aforesaid and according to that adjudication, whereby and by force of the said statute the defendant then became and still is released from this action so far as relates to the said trespasses in the introductory part of this plea mentioned. And this the defendant is ready to verify, &c.

Plea of certificate and discharge under the same statute. (p)

Same as the above to the asterisk, and then as follows.] And thereupon the said justices, so being such justices, did then dismiss the said complaint upon the hearing thereof, on the ground that the said offence was not proved; and thereupon they the said justices, so being such justices, did then according to the said statute forthwith make out a certificate under their hands, stating the fact of such dismissal, and did then deliver the said certificate to the defendant, as by the certificate of the said J. D. and S. P. under their hands, and now shown to the Court here, more fully and at large appears, which said dismissal still remains in full force and effect; whereby and by force of the said statute, the defendant then became and still is released from the said action, [so far as relates to the said trespasses in the introductory part of this plea mentioned.] And this the defendant is ready to verify, &c.

Defence of Possession of Personalty or Realty.

1. Defence of Possession of Personalty or Realty.

See *Dean* v. *Hogg*, 6 Car. & P. 54; 3 Tyr. 811.

Plea in defence of defendant's possession of a steam vessel, and that plaintiff intruded, &c.

That plaintiff was unlawfully in defendant's dwelling-house, and *molliter manus imposuit* to turn him out. (q)

And for a further plea in this behalf, [as to the assaulting, beating (r) and ill-treating the plaintiff, in the said declaration mentioned,] the defendant says, that the defendant, before and at the said time when &c., was lawfully possessed (s) of a certain dwelling-house, (t) with the appurtenances, situate

(p) This plea must allege the grounds upon which such certificate was given; *Skuse* v. *Davis*, 2 P. & D. 550. Where the charge was dismissed on the 29th of November, and the justices did not give their certificate of such dismissal until the 10th of January, it was held that it had not been granted forthwith, within the meaning of section 27 of the statute, and was therefore no bar to an indictment for the same assault; and where a plea of dismissal alleged that the justices, deeming the offence not to be proved, "*forthwith*" gave the defendant a certificate of such dismissal, and the replication traversed the giving of the certificate, *modo et forma*, it was held, (*dubitante* Coleridge, J.) that the *time* of giving the certificate (*inter alia*) was in issue; *The Queen* v. *Robinson*, 4 P. & D. 391.

(q) As to this plea, see *ante*, 319, n. (*t*); see Com. Dig. Pleader, 3 M. 16, 17, and the forms, 8 T. R. 299, 78; 9 Wentw. 116; 2 Rich. C. P. 59; Plead. Assist. 495, 6; see form of plea in *Piggott* v. *Kemp*, 1 Crom. & M. 197; *Timothy* v. *Simpson*, 1 Crom. M. & Ros. 757; 5 Tyr. 244; and see a plea justifying turning plaintiff out of a police-office and law thereon, *Collier* v. *Hicks*, 2 Bar. & Adol. 665; and plea justifying turning plaintiff out of vestry-room, 7 Bing. 305; 5 Moore & P. 112, S. C.

(r) A *wounding* cannot be justified merely in defence of possession, 8 T. R. 299; Com. Dig. Pleader, 3 M. 16, 17; 1 Salk. 407; Lutw. 1483; though if the plaintiff attempted to enter the house with force it is otherwise, see the law and precedent, 8 T. R. 78. If the plaintiff, upon the attempt to remove him, resisted, and was guilty of an assault upon the defendant or his family, and the defendant did actually beat or wound him in self-defence, those acts may be justified, 8 T. R. 299, stating at the † in the above form the assault by the plaintiff, and the defendant's self-defence, as in the form, *ante*, 319; see also n. (*z*), *post*, 324.

(s) This is sufficient; 3 Wils. 71, 73; 8 T. R. 78, 299.

(t) A plea to trespass for assault and battery, that the defendant was in possession of a dwelling-house, and that the plaintiff disturbed him in his possession, wherefore he turned him out, is not sustained by proof that the defendant was a lodger occupying one room in a house, the landlord keeping the key of the outer door; *Monks* v. *Dykes*, 4 M. & W. 567.

DEFENCE OF POSSESSION.

and being at ——; and being so possessed thereof, the plaintiff, just before the said time when &c., to wit, on the same day and year in the said declaration mentioned, was unlawfully in the said dwelling-house and with force and arms making a great noise and disturbance therein, and at the said time when &c. stayed and continued therein, making such noise and disturbance, without the leave or license and against the will of the defendant, and during all that time greatly disturbed and disquieted the defendant and his family in the peaceable and quiet possession and enjoyment of his said dwelling-house; and thereupon the defendant then requested (*u*) the plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do,* whereupon the defendant, in defence of the possession of his said dwelling-house, at the said time when &c. gently laid his hands upon the plaintiff, in order to remove and did then remove the plaintiff from and out of the said dwelling-house, as he lawfully might for the cause aforesaid,† which are the said alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath complained against the defendant. (*x*) And this the defendant is ready to verify, &c.

Plea, justifying turning plaintiff out of police-office.

See form and law thereon, *Collier* v. *Hicks*, 2 Bar. & Adol. 665.

The like of a public house.(*y*)

And for a further plea in this behalf, the defendant says, that he the defendant long before and at the said time when &c. was lawfully possessed of a certain public house, situate at &c. aforesaid. And the plaintiff a little before the said time when &c., entered and came into the said house of the defendant, and then made a great noise and disturbance therein, and the plaintiff then behaved and conducted himself in a rude, quarrelsome and uncivil manner towards divers persons then lawfully being in the said house, and thereby then greatly disturbed and disquieted the defendant and his family and the said other persons, so being in the said house, in the peaceable and quiet occupation and enjoyment thereof; whereupon the defendant then requested &c. [*Same as in the last preceding form to the end.*

The like, except in stating that defendant gave charge of plaintiff to a policeman.(*z*)

The same as the precedent supra to the asterisk, and then as follows:] And continued in the said house, making the said noise, disturbance and

(*u*) As to this request, see 1 C. & P. 6; 8 T. R. 299, 78.

(*x*) As to this averment, see *ante*, vol. i. Index, "*Quæ est eadem*," &c.; 2 Stra. 694; 2 Saund. 5, n. 3; 1 Saund. 81, n. 3; 85, 298; and see the forms, Cowp. 162, 171; 2 Bro. Ent. 139.

(*y*) See pleas and law, *Moriarty* v. *Brooks*, 6 Car. & P. 684; *Howell* v. *Jackson*, 6 Car. & P. 723. Where to trespass for assaulting the plaintiff and with the defendant's hands and with a truncheon beating, bruising, *wounding* and ill-treating her, and striking her down with the truncheon, whereby her thigh was broken, the defendant pleaded as to assaulting, beating and ill-treating the plaintiff, that the defendant was possessed of a public house, and the plaintiff was making a great noise and disturbance therein, whereupon the defendant requested her to cease from making such noise and disturbance and to leave the house, which she refused; whereupon the defendant in defence of the possession of his house gently laid his hands upon her in order to remove her, and did remove her out of the house, it was held that the plea was no justification of the striking and wounding with the truncheon; *Oakes* v. *Wood*, 2 M. & W. 791; see also 3 M. & W. 150.

(*z*) See this form in *Timothy* v. *Simpson*, 5 Tyrw. 244; 1 Crom. M. & Ros. 757, S. C., and see *Ingle* v. *Bell*, 1 M. & W. 516.

affray therein; whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a policeman of the City of London, and then requested the said policeman to take the plaintiff into his custody, to be dealt with according to law, and the said policeman so being such policeman as aforesaid, then having view of the said misconduct of the plaintiff (*b*), at such request of the defendant, then gently laid his hands on the plaintiff for the cause aforesaid, and did then take the plaintiff into his custody, and did carry and conduct him the plaintiff from and out of the said house to and along the said streets, highways and places to the said police-station for examination concerning the premises, and to be dealt with according to law, and on that occasion the plaintiff was necessarily and unavoidably imprisoned, and kept and detained in prison for the space of time in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid, which are the same alleged trespasses in the introductory part of this plea mentioned. [*Conclude with a verification.*

DEFENCE OF POSSESSION.

And for a further plea in this behalf [as to the assaulting, beating and striking the plaintiff with a stick, as in the said declaration mentioned (*d*),] the defendant says, that he the defendant, before and at the said time, when &c. in the said declaration mentioned, was lawfully possessed of and in a certain messuage or dwelling-house, situate at &c. in which he the defendant did then inhabit and dwell, and that he the defendant being so possessed thereof, the plaintiff, just before the said time when &c. to wit, on the same day and year aforesaid, with force and arms, and with a strong hand (*e*), did attempt and endeavour forcibly to break into and enter the said messuage or dwelling-house of the defendant without the leave or license and against the will of the defendant; whereupon the defendant, at the said time when &c. being in the said messuage or dwelling-house, in order to preserve the peaceable and quiet possession thereof, did then resist and oppose such entrance of the plaintiff into his said messuage or dwelling-house, and in so doing did necessarily and unavoidably commit the said several alleged trespasses in the introductory part of this plea and in the said declaration mentioned, and as he lawfully might for the cause aforesaid; and so the defendant in fact saith, that the damage or injury in the said declaration mentioned which then happened to the plaintiff, was occasioned by the defendant's said defence of his said possession of his said messuage or dwelling-house against the plaintiff, which are &c. [*Conclude as in the form, ante, 324, from the* †, *with a verification.*

The like, in *resistance of plaintiff's entry* into defendant's dwelling-house. (*c*)

And for a further plea in this behalf [as to the said assaulting of the plaintiff in the said declaration mentioned, and beating and ill-treating him

Defence of possession of a close. (*f*)

(*b*) *Quære*, whether it should not be here averred that the policeman *had view of the breach*, see *post*, 328, n. (*q*)

(*c*) See the form, 8 T. R. 78, and the notes to the form, *ante*, 323.

(*d*) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases is unnecessary.

(*e*) A forcible attempt to enter will justify a battery and wounding; 8 T. R. 78.

(*f*) As to this plea, see 8 T. R. 78; and see form justifying taking plaintiff found on defendant's land, in illegal possession of a hare of defendant, *Wisdom* v. *Hodson*, 3 Tyr. 811.

DEFENCE OF POSSESSION.

as therein mentioned, (*g*)] the defendant says, that he the defendant, before and at the said time when &c. was lawfully possessed of and in a certain close, to wit, a close called —— [*or* "abutting &c." *setting out the abuttals, as pointed out, ante, vol. ii.* 662], in the parish of ——, in the county aforesaid [and of a certain gate of and belonging to the same close], and being so possessed, the plaintiff, a little before the said time when &c. with force and arms, and with a strong hand, and without the license or permission and against the will of the defendant, did force and break open [the said gate], and as much as in him the plaintiff lay, did attempt and endeavour forcibly to break into and enter the said close of the defendant, [and forcibly to drive into the said close a great number, to wit, —— sheep of the plaintiff(*h*)] and would then unlawfully and forcibly, with a strong hand, have effected and accomplished such unlawful attempt and endeavour, without the license or permission of the defendant and against his will, if the defendant had not defended his said possession of his said close [and gate], whereupon the defendant, being then in his said close, and during the said forcible and wrongful attempt and endeavour of the plaintiff, did, at the said time when &c. defend his the defendant's possession of his said close [and gate] and oppose and resist the said attempt and endeavour of the plaintiff, as it was lawful for him the defendant to do on the occasion aforesaid. And the defendant further saith, that all the damage or injury that then happened to the plaintiff, the same happened and were occasioned of the wrong of the plaintiff, and in the defence by the defendant of his said close [and gate]; which are the same alleged trespasses in the introductory part of this plea mentioned. (*i*) And this the defendant is ready to verify, &c.

Plea, that the defendant had seized horses of the plaintiff damage feasant, and were removing them to a pound, and because the plaintiff interrupted, molliter manus imposuerunt. (*k*)

And for a further plea in this behalf, the defendants say, that the defendant G. A. before and at the time when &c. was lawfully possessed of a certain close &c. situate &c.; and that just before the time when &c. to wit, &c.; two certain horses and two sets of harness, one prong and one shovel, were wrongfully in the said close in which &c. doing damage to the said defendant G. A. there, whereupon the said G. A. and the other defendants J. B. and T. H. as his servants, and by his command, afterwards, and just before the said time when &c. to wit, &c. seized and took the said horses, harness, prong and shovel in the said close of G. A., so doing damage there as aforesaid, as a distress for the said damage. And the defendants further say, that the defendant G. A. and the other defendants J. B. and T. H. as his servants, and by his command, were then, to wit, on the day and year last aforesaid, about to lead, drive and carry away the said horses, harness, prong and shovel out of the same close, in which &c. to a certain common pound in the said county, within the hundred where the said distress was taken, to impound the same there, and keep the same impounded till the defendant G. A. should be reasonably satisfied for the said damage so done by the horses &c. as it would have been lawful for the defendants to do for

(*g*) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases is wholly unnecessary.

(*h*) These averments must correspond with the facts.

(*i*) As to this averment, see *ante*, 324, n. (*z*).

(*k*) See *Field* v. *Adams*, 12 A. & E. 649; 4 P. & D. 505, S. C.

the cause aforesaid. And because the plaintiff afterwards and just before the time, when &c. to wit, on the day and year last aforesaid, unlawfully interfered with and interrupted the defendants in proceeding with the said distress, and at the time when &c. stayed and continued interfering with and interrupting them as aforesaid, the defendant G. A. and the other defendants, as his servants and by his command, thereupon, in defence of the right of the said G. A. and of the said J. B. and T. H. as his servants and by his command, to proceed with the said distress damage feasant as aforesaid, at the time when &c. gently laid their hands &c. and did then remove the plaintiff from his said interfering with and interrupting &c., and in so doing did then necessarily a little assault &c. which are the same trespasses whereof the plaintiff has complained against the defendants. And this the defendants are ready to verify, &c.

DEFENCE OF POSSESSION.

2. IMPRISONMENT WITHOUT PROCESS.

IMPRISONMENT WITHOUT PROCESS. (*l*)

And for a further plea in this behalf [as to the assaulting, beating, and ill-treating of the plaintiff as in the said declaration mentioned, and compelling him to get into the said cart in the said first count mentioned, and to go and travel therein the distance in the declaration mentioned, and as to the imprisoning the plaintiff, and keeping and detaining him in prison for the said time in the said declaration mentioned, (*n*)] the defendants say, that before and at the said time when &c. in the said first count mentioned, the said C.

Plea by two defendants to a declaration for assault and imprisonment, that plaintiff committed a *breach of the peace* in the house of one of them, and that the other defendant as a constable apprehended plaintiff, and carried him before a magistrate. (*m*)

(*l*) See a precedent of a justification by a sheriff at an election, 1 Taunt. 146.

(*m*) As to pleas of this description, see Com. Dig. Pleader, 3 M. 22, and the precedents in *Timothy* v. *Simpson*, 5 Tyr. 244; 9 Wentw. Index, ciii. Where plaintiff complained of assault and battery, and of being taken in custody along the streets, and of being imprisoned on a charge of assault with intent to commit a felony; and defendant pleaded that plaintiff having assaulted him, defendant gave plaintiff in charge of a peace-officer, who laid hands on him and took him before a justice; held, that the facts pleaded were an insufficient answer to the facts declared on, although at the trial only one assault was proved; *Stammers* v. *Yearsley*, 10 Bing. 35; 3 Moore & Scott, 410, S. C.; see also *Baynes* v. *Brewster*, 1 G. & D. 669. A peace officer acting by virtue of his office need not join in the plea, but may plead the general issue by statute, and give the special matter in evidence; 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12; see Burn, J. 28th edit. "*Constable*;" 1 Stra. 446; 9 B. & Cres. 806. It may, however, frequently be advisable for such officer to join in the plea, in order to narrow the evidence on the trial, especially when he acted under a warrant, in which case the general replication *de injuriâ* would be insufficient; sometimes, however, it is best for him not to join in the plea; see 2 Bingh. 523. Where a party merely acts in the aid and assistance of the officer, he may defend under the general issue, 3 Campb. 257; but not so if he act as the prime mover and principal in the transaction, 2 Stark. 445; Holt, C. N. P. 478; and a private individual who makes the charge, and puts the constable in motion, cannot justify under the general issue; he must plead the special circumstances by way of justification, Holt, C. N. P. 478; see precedents for plea justifying removal of plaintiff out of church for making disturbance in it, 4 D. & R. 217; 2 B. & C. 699, S. C.

In the case of a justification at common law by a constable, under the warrant of a justice of the peace, a plea is bad which does not show that the justice had jurisdiction over the subject-matter upon which the warrant is granted. Where a limited authority only is given, if the party to whom such authority is given extends the exercise of his jurisdiction to objects not within it, his warrant will be no protection to the officers who act under it; and by necessary consequence when an officer justifies under a warrant so granted by a Court of limited jurisdiction, he must show that the warrant was granted in a case which fell within such limited jurisdiction; *Morrell* v. *Martin*, 3 M. & G. 594, 697.

(*n*) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and is in many cases wholly unnecessary.

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D. was lawfully possessed of a certain dwelling-house, situate at ——, and the said C. D. being so possessed thereof, the plaintiff, just before the said time when &c. to wit, on &c. in the said declaration mentioned, entered and came into the said dwelling-house, and then with force and arms made a great noise, disturbance and affray therein, and then insulted, abused and ill-treated the said C. D. and his family in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lady the queen; whereupon the said C. D. then requested the plaintiff to cease his said noise and disturbance, and to depart from and out of the said house, which he the plaintiff then wholly refused to do, and continued in the said house making the said noise, disturbance and affray therein, and then threatened the said C. D. and his family that he would continue making his said noise and disturbance in the said house during the whole night, and hinder and prevent the said C. D. and his family from sleeping or enjoying any quiet or repose in the said house, (*o*) whereupon the said C. D. in order to preserve the peace and restore good order and tranquillity in his said house, then gave charge of the plaintiff to the said E. F. then and there being a constable of the ——, (*p*) *who then and there saw and had view* (*q*) *of the said breach of the peace*, so committed by the plaintiff as aforesaid, and then requested the said E. F. so being such constable as aforesaid, to take the plaintiff into his custody, and carry him before some justice or justices of our said lady the queen, assigned to keep the peace in and for the said county of ——, to answer the premises, and to be dealt with according to law, and the said E. F. so being such constable as aforesaid, at such request of the said C. D., then gently laid his hands on the plaintiff for the cause aforesaid, and did then take the plaintiff into his custody, and did carry and conduct the plaintiff from and out of the said house, (*r*) in order to carry and convey him before such justice as aforesaid, to be there dealt with according to law for his said offence and breach of the peace; and because it was then late at night, (*r*) and an unseasonable time for the said E. F. to carry the plaintiff before such justice as aforesaid, he the said E. F. so being such constable as aforesaid, for that reason and for the cause aforesaid, necessarily and unavoidably imprisoned the plaintiff, and kept and detained him in a certain prison in the parish aforesaid, called the ——, until the next morning; and the defendants

The plaintiff's breach of the peace.

Request to him to cease it, and his refusal.

Plaintiff given in charge to a constable.

Who *molliter manus imposuit.*

And because it was too late at night the constable kept him in custody.

(*o*) The plea must show a continuance of the breach of the peace, or facts from which a renewal of the breach was to be apprehended; *Baynes* v. *Brewster*, 1 G. & D. 669.

(*p*) Take care that his appointment be properly described; he must be appointed for a township, &c. and not for a parish; 7 East, 174. Who is not an authorised officer, 5 Esp. R. 39; Burn, J. 28th ed. "*Constable.*"

(*q*) In a plea justifying an *imprisonment* by a constable not under a warrant, it seems necessary in general to aver that the constable had *view* of the breach of the peace, for it has been decided that a constable cannot arrest for an affray out of his view without a warrant, except felony is likely to ensue; Cro. Eliz. 375; 2 Esp. Rep. 540; 3 Hawk. Pl. Cr. 174, 164, book 2, c. 13, s. 8; 1 Esp. Rep. 294; Holt, C. N. P. 478; R. & M. C. C. 132; Burn, J. "*Arrest*;" but see 2 Hale, 90; 3 Campb. 420; and as to these pleas in general see 1 Chit. Crim. Law, 23. There are precedents, however, omitting such statement, 9 Wentw. 27, 344, 5; and in a case where the disturbance had been made in a house late at night, and the plaintiff would not go out, but was not guilty of a breach of the peace within the view of the constable, a very able pleader advised a special plea, omitting the above statement, considering that a practice contrary to the above decisions had so long prevailed, and was so necessary for the maintenance of a proper police, that probably a different decision might now take place.

(*r*) This and the subsequent averments must correspond with the facts.

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further say, that on the next morning, as soon as conveniently could be, he the said E. F. so being such constable as aforesaid, endeavoured to carry and convey the plaintiff before such justice as aforesaid, to answer the said premises, and to be dealt with according to law; and because no justice as aforesaid could be found near to the said prison, and because it was then expedient and necessary that the plaintiff should go, proceed and be carried in the said cart before such justice as aforesaid, for the purpose aforesaid, and because the plaintiff then refused to get into such cart for the purpose aforesaid, he the said E. F. so being such constable as aforesaid, and the said C. D. in his aid and assistance, and at his request, did gently lay their hands upon the plaintiff, and did then gently force and compel the plaintiff to get into the said cart, and to go and travel therein the said distance in the said declaration mentioned, in order that he the plaintiff might be carried and conveyed by the said E. F. so being such constable as aforesaid, before such justice as aforesaid, to answer the premises, and be there dealt with according to law, for his said offence and breach of the peace. And the defendants further say, that afterwards, and while the said E. F. so being such constable as aforesaid, was so carrying and conveying the plaintiff before such justice as aforesaid, to wit, on &c. aforesaid, he the said E. F. at the special solicitation and request of the plaintiff, upon his making a reasonable and proper submission for the said offence, and with the consent of the plaintiff, discharged the plaintiff from and out of his said custody, and then permitted him to go at large, without carrying him before such justice as aforesaid, (*t*) as they the defendant and E. F. lawfully might for the cause aforesaid, which are the same alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above thereof complained against the defendants. And this the defendants are ready to verify, &c.

No magistrate to be found in the way.

On plaintiff's submission and request, defendants suffered him to go at large.

The like in a more concise form, by the private person only. (*u*)

And for a further plea in this behalf, [as to the making the said assault upon the plaintiff in the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for a part of the said time in the said declaration mentioned, to wit, for the space of eight hours, part of the time in the declaration mentioned,] the defendant says, that just before the said time when &c. to wit, on the same day and year aforesaid, the plaintiff with force and arms, &c. made an assault upon the defendant, and beat and ill-treated him, and thereupon the defendant then gave charge of the plaintiff to a certain peace-officer of our said lady the queen, to wit, one E. F. who then had view of the said breach of the peace of our said lady the queen, so committed by the plaintiff as aforesaid, and requested the said peace-officer to take the plaintiff into his custody, and carry him before some justice or justices of our said lady the queen, assigned to keep the peace in and for the said county of ——, to answer the premises, and to be examined and dealt with according to law; and the said peace-officer, at such request of the defendant, and the defendant in the aid and assistance of the said peace-officer, then gently laid their hands upon the plaintiff, in order to take, and

(*t*) This statement of defendant's release is to be according to the fact, *quære* the sufficiency of this statement; 5 East, 294; 3 Hawk. P. C. 174. It should seem it is justifiable in the case of a mere affray or breach of the peace; *id.* and see 3 C. & P. 397.

(*u*) See the notes to the former precedent.

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did then take the plaintiff into the custody of such peace-officer, and kept and detained him so in custody until the plaintiff afterwards, and as soon as conveniently could be, was carried before one of her majesty's justices assigned to keep the peace in and for the said county of ——, for examination concerning the premises, and to be dealt with according to law, and on that occasion the plaintiff was necessarily and unavoidably imprisoned and kept and detained in prison for the said space of time in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid; which are the same alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above thereof complained against the defendant. And this the defendant is ready to verify, &c.

Plea to trespass and false imprisonment, justifying taking plaintiff out of a house, and keeping him in custody from Saturday night till Monday morning, that plaintiff was drunk and riotous, and it was too late to take him before a justice till Monday morning.

And for a further plea in this behalf, the defendant says, that the plaintiff before and at the time when &c. to wit, on &c. was in the said dwelling-house greatly intoxicated, and in a tumultuous, turbulent and violent manner, and with force and arms, making an affray, to the terror and disturbance of our lady the queen's subjects there then being, and in breach of the peace of our lady the queen, and wherein L. and S. were assaulted and abused by the plaintiff without any just or reasonable cause, and thereupon the defendant then, in order to preserve the peace and prevent the plaintiff from continuing so to conduct himself in a tumultuous, turbulent and violent manner, making the said affray and breach of the peace, and which he would therein have done, then gave charge of the plaintiff to one ——, then and there being a police-officer and a constable, duly qualified to act as such in that behalf, and who then had view of the said affray and breach of the peace, so committed by the plaintiff as aforesaid, and then requested the said ——, so being such police-officer and constable as aforesaid, to take the plaintiff into his cutody and carry him before some justice or justices of the peace in and for the said county of ——, being the county in which the said affray and breach of the peace were committed, to answer the premises, and to be dealt with according to law. And thereupon the said ——, so being such police-officer and constable as aforesaid, at such request of the defendant, then gently laid his hands on the plaintiff for the cause aforesaid, and did then take the plaintiff into his custody, and did force and compel the plaintiff to go, and did conduct the plaintiff from and out of the said dwelling-house into the said public highway, in order to conduct and convey him before such justices aforesaid, to be there dealt with according to law for his said offence and breach of the peace, and because it was then late in the evening, and an unreasonable time for the said constable to conduct the plaintiff before such justices as aforesaid, and because the day next following was Sunday, he the said ——, so being such police-officer and constable as aforesaid, for that reason and for the cause aforesaid, forced and compelled the plaintiff to go in and along the said public highway to the said station-house, and necessarily and unavoidably caused the plaintiff to be imprisoned and kept and detained in prison there in the said cell until the next Monday morning, and afterwards on that Monday, and as soon as conveniently could be, the plaintiff was conducted and caused to appear before one of her majesty's justices, assigned to keep the peace in and for the said county, for examination concerning the premises, and to be dealt with according to law, and on the

occasion aforesaid the plaintiff was necessarily and unavoidably trespassed upon and assaulted, seized and laid hold of, pulled and dragged about, and given and struck the said blows and strokes, (y) and forced and compelled to go about and be imprisoned, and kept and detained in prison as in the said declaration mentioned, as he lawfully might have been for the cause aforesaid, the defendant on those occasions doing no unnecessary trespass or damage to the plaintiff, and which are the said alleged trespasses in the said declaration mentioned. And this the defendant is ready to verify, &c.

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And for a further plea in this behalf, to the [first] count of the declaration, the defendant says, that before and at the time when &c. in that count mentioned, the defendant was lawfully possessed of a certain dwelling-house and shop, situate in the parish of ——, in the county of ——, in which he exercised and carried on the trade and business of a baker, and the defendant being so possessed thereof, the plaintiff, just before the said time when &c. had been and was in the shop of the defendant, making a great noise and disturbance therein, and there insulted and abused the defendant, and greatly disturbed and disquieted him and his family in the peaceable and quiet possession thereof, in breach of the peace of our lady the queen, and thereby hindered and obstructed the defendant in the lawful exercise and carrying on of his business in his said shop; and the plaintiff, just before the said time when &c. had departed from and out of the said shop of the defendant into the public street there, in front of the said dwelling-house and shop of the defendant, and there continued to make a great noise and disturbance, and to insult and abuse the defendant, and caused a large concourse and mob of persons then passing and repassing along the said street to assemble and remain and continue opposite to the said dwelling-house and shop of the defendant, and thereby greatly disturbed the defendant in possession and occupation of his said shop, and hindered and obstructed him in the lawful exercise and carrying on of his said business therein, in breach of the peace of our said lady the queen, and caused and created a great riot and disturbance in the said street; whereupon the defendant civilly requested the plaintiff to cease such his said noise and disturbance and creating such riot, and to go and depart from before the said house and shop of the defendant, which the plaintiff then wholly refused to do, and at the said time when &c. still remained and continued before and in front of the said house and shop of the defendant, there making such noise, riot and disturbance as aforesaid; whereupon the defendant, in order to preserve the peace, and to restore order and tranquillity, then sent for certain police-officers who were then on duty in the public street there, and requested them to remove the plaintiff away from before his said house and shop; and the said police-officers then civilly requested and entreated the said plaintiff to cease his said noise, riot and disturbance and abuse, and to go and depart from before the said house and shop of the defendant; and because the plaintiff then wholly refused so to do, and persisted in remaining and continuing, and did remain and continue before and in front of the said house and shop of the

Plea to assault and false imprisonment, that the plaintiff abused the defendant, and caused an assemblage of persons before his shop, in breach of the peace. (z)

(y) But note, without alleging that plaintiff *violently* resisted or attempted to escape, the plea cannot legally justify the giving the plaintiff blows or strokes.

(z) See *Cohen* v. *Huskisson*, 2 M. & W. 477; *Ingle* v. *Bell*, 1 M. & W. 516.

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defendant, making such noise, riot and disturbance and abuse, and hindering and obstructing the defendant in carrying on his lawful and necessary business therein, the defendant, in order to preserve the peace and restore tranquillity, did then charge the said police-officers with the said plaintiff, and desired the said police-officers to take the plaintiff to the said police station-house in the [first] count mentioned, and the plaintiff was thereupon taken by the said police-officers to the said police station-house, to be there dealt with according to law for the said breach of the peace; and the defendant at the said station-house charged the plaintiff with creating a disturbance and causing a mob to assemble outside the shop of the defendant, whereupon the said police-officers were ordered and directed to take and did then take the plaintiff from the said station-house to the said public police office, to be there examined touching the premises aforesaid, and to be further dealt with according to law; and the plaintiff accordingly was there and then examined by and before certain magistrates acting at the said public police office touching the premises aforesaid; and the said magistrates, having heard the complaint of the defendant, and having heard the plaintiff as to his defence in the premises, then admonished the plaintiff for such his riotous, disorderly and illegal conduct and behaviour; whereupon the plaintiff promised the said magistrates not to create any further disturbance before the said house and shop of the defendant, or to commit any further breach of the peace; and thereupon the said magistrates ordered and directed that the plaintiff should be discharged out of custody, and the plaintiff was thereupon immediately discharged accordingly, which are the same supposed trespasses, &c. And this the defendant is ready to verify, &c.

Plea, that plaintiff was servant to defendant in his trade, and defendant gave him warning, but he refused to leave, and was insolent, and therefore defendant pushed plaintiff out of house.

See form of plea and replication and law, *Donaldson* v. *Williams*, 3 Tyrw. 371.

Plea, justifying imprisoning plaintiff, and taking him before a magistrate, he having been guilty of a felony, on 7 & 8 Geo. 4, c. 29, s. 47, as a clerk, in embezzlement of defendant's property. (a)

If only part of the trespass, as stated in the declaration, can be justified, then confine the commencement of the plea accordingly.] That the plaintiff, before the commission of the said alleged trespasses in the said declaration mentioned, to wit, on &c. [*day of the felony, or about it,*] [*here state the offence committed by the plaintiff in substance, as it should be stated in an indictment, as thus:* " being then employed as a clerk to the defendant, did, by virtue of such his employment, then, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit,

(a) The plea may be readily adapted to a case where plaintiff has been guilty of any other felony or misdemeanor. In order to justify a private person in arresting another for *felony*, it is absolutely requisite that a *felony* should have been committed *by some one*. If committed by plaintiff, the above plea will be correct, but if committed by some other person, and plaintiff be suspected of it, then the plea should be as *post*, 333. See plea, 6 Car. & P. 687; and *Atkinson* v. *Warne*, 3 Dowl. 483, by a police officer. It is not necessary to prove all the allegations in plea, and it suffices to make out the felony; 6 Car. & P. 687; and see 3 Bar. & Cres. 596. To an action for assaulting the plaintiff and causing him to be taken to a police station, and afterwards before a magistrate, upon an unfounded charge of having unlawfully attempted to procure from the banking-house of the defendant a blank cheque book, a plea which neither alleged that a felony had been committed, so as to make it a good justification at common law, nor that the plaintiff had been " found committing" any offence against the provisions of the 7 & 8 Geo. 4, c. 29, so as to justify his apprehension without warrant, under the 63rd section of that statute, was held bad; *Mathews* v. *Biddulph*, 3 M. & G. 390.

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to the amount of [£100] [*or* ' goods and chattels, to wit, &c.' *as the case was*] for and in the name and on the account of the defendant his master as aforesaid, and the said money [*or* ' goods and chattels'] then fraudulently and feloniously did embezzle. And the defendant further saith, that the plaintiff then, in manner and form as aforesaid, the said last-mentioned money [*or* ' goods and chattels'] the property of the defendant his master as aforesaid, from the defendant feloniously did steal, take and carry away, against the form of the statute in that case made and provided, and against the peace of our lady the queen;"] wherefore the defendant did, at the said time when &c. in the said declaration mentioned, gently lay his hands on the plaintiff, and [*if the defendant gave plaintiff in charge of a constable, then state the fact, and as between the inverted commas, thus:* " did give the plaintiff in charge to one J. K. then being a constable and a peace officer of and for our said lady the queen in and for the county of S. [*or* ' town and borough of S. in the county of S.'](*b*) and then requested the said constable and peace officer to take the plaintiff into his custody, and safely keep him until he could be carried and conveyed, and to carry and convey him before some one of the justices assigned to keep the peace of our said lady the queen, within the said county [*or* ' town and borough'], and to hear and determine divers felonies and misdemeanors committed within the said county [*or* ' town and borough'] to be examined by and before such justice touching and concerning the premises, and to be further dealt with according to law; and on that occasion the said J. K. so being such constable and peace officer as aforesaid, at the request of the defendant,"] then did take the plaintiff into his custody, and as soon as conveniently could be, to wit, on the day and year aforesaid, the plaintiff was carried and conveyed in custody before J. A. Esq. one of the justices assigned to keep the peace of our said lady the queen within and for the said county [*or* " town and borough"], and also to hear and determine divers felonies and misdemeanors within the said county [*or* " town and borough"] committed, to be examined by and before the said J. A. touching and concerning the premises, and to be further dealt with according to law, (*c*) and by means of the said several premises aforesaid, the plaintiff was imprisoned, and kept and detained in prison, for the said space of time in the said declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid, which are the alleged trespasses in the said declaration mentioned, and whereof the plaintiff hath above thereof complained against the defendant. And this he is ready to verify, &c.

If any doubt as to whether plaintiff was a clerk or servant, within the act, add another plea precisely similar, except in stating the plaintiff was " servant," instead of " clerk."

Plea, justifying imprisonment of plaintiff on *suspicion* of felony. (*d*)

And for a further plea in this behalf, [as to the assaulting, seizing and laying hold of the plaintiff, as in the said declaration mentioned, and pulling

(*b*) See allegations in case of a policeman, 6 Car. & P. 687; 3 Dowl. 483, S. C.

(*c*) When the magistrate has full possession of the charge, the party laying it in general ceases to be an actor in the matter, and need not justify acts done subsequently.

(*d*) The plea justifying the apprehension of plaintiff *on suspicion of felony*, must show the cause of suspicion; 4 Taunt. 34; Holt, C. N. P. 478. As to the causes for such suspicion, see Burn, J. 28th edit. tit. " *Arrest.*" The question of probable cause is a mixed propo-

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and dragging about the plaintiff, and forcing and compelling her the plaintiff to go from and out of a certain dwelling into the public street, and forcing and compelling her to go in and along the said streets to the said mansion-house in the said declaration mentioned; and as to imprisoning the plaintiff, and keeping and detaining her in prison for the said time in the said declaration mentioned,] the defendant says, that before and at the time when &c. to wit, on &c. aforesaid, [*here state the felony to have been committed, and the causes of suspicion against the plaintiff, and which, in the plea in question, was stated as follows:* " the plaintiff was the servant of the defendant, and was then living and residing in the house of him the defendant; and the plaintiff, so being such servant as aforesaid, divers goods and chattels, to wit, twenty pair of silk stockings and one hundred yards of lace, of great value, to wit, of the value of £—— the property of the defendant, had been and were feloniously stolen, taken and carried away from and out of the possession of the defendant, (*e*) and afterwards, to wit, on &c. divers, to wit, twenty bundles, containing the said goods and chattels so feloniously taken and carried away as aforesaid, were found and discovered hidden and concealed in a certain cellar of and belonging to the house of the defendant, and to which the servants of the defendant had access, and the said bundles, containing the said goods and chattels, being so found and discovered as aforesaid, were immediately seized and taken away by the plaintiff, the plaintiff then averring that the same were the property of her the plaintiff, and the plaintiff then endeavoured to burn and make away with the said bundles, with their contents aforesaid, and did actually burn divers, to wit, ten of the said bundles, so containing the said goods and chattels, the property of the defendant as aforesaid; (*f*) wherefore the defendant having good and probable cause of suspicion, and vehemently suspecting the plaintiff to have been guilty of or concerned in the stealing and carrying away of the said goods and chattels of the defendant, and to have feloniously taken and carried away the same, did, at the said time when &c., gently lay hands on the plaintiff, and did give the plaintiff in charge to one W. S. then being a constable and peace officer of and for our lady the queen in and for the [city of London] aforesaid, and then requested the said constable and peace officer to take the plaintiff into his custody, and safely keep her until she could be carried and conveyed, and to carry and convey her before some one of the justices assigned to keep the peace of our said lady the queen within and for the city of London, and to hear and determine divers felonies and misdemeanors committed within the said city of London, to be examined by and before such justice touching and concerning the premises, and to be further dealt with according to law; and on that occasion the said W. S. so being such constable and peace officer as aforesaid, at the request of the

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sition of law and fact. See 5 Bing. 554, and cases there cited; and see form of plea justifying assault and compelling plaintiff to go to a police station, that a gun had been stolen and pawned, and that there was reasonable cause for suspecting the plaintiff, *Hall* v. *Booth*, 3 Nev. & M. 316.

(*e*) To justify an arrest by a private individual without warrant, on suspicion, it is absolutely necessary that a *felony* shall have been actually committed, 6 B. & C. 637; and so in the case of a constable, who, of his own head, takes a party into custody on suspicion, 3 Campb. 420.

(*f*) *Semble*, it would suffice to prove some of the alleged acts of felony, &c.; *Atkinson* v. *Warne*, 6 Car. & P. 687; 3 Dowl. 483.

defendant, did then gently lay his hands upon the plaintiff, (*g*) in order to take and did then take the plaintiff into his custody, and as soon as conveniently could be, to wit, on the said —— day of —— in the year aforesaid, the plaintiff was carried and conveyed in custody to and before Sir W. L. knt. and alderman of the city of London, and one of the justices assigned to keep the peace of our said lady the queen within and for the said city of London, and also to hear and determine divers felonies and misdemeanors committed within the said city, to be examined by and before the said Sir W. L. touching and concerning the premises, and to be further dealt with according to law, and the plaintiff was then detained (*h*) by order of the said Sir W. L. until and upon the —— day of —— in the year aforesaid, when she the plaintiff was examined by the said Sir W. L. touching and concerning the premises, and the plaintiff was afterwards discharged out of custody by the said Sir W. L.; and by means of the said several premises aforesaid, the plaintiff was imprisoned, and kept and detained in prison, for the said several spaces of time in the said declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid, which are the alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above complained against the defendant."] And this he is ready to verify, &c.

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And for a further plea in this behalf, the defendant says, that before the commission of the said alleged trespasses in the said declaration mentioned, to wit, on &c., the plaintiff did *feloniously* take, steal and carry away divers, to wit, twenty pounds weight of feathers, part of a certain bed let to be used by him in and with divers rooms and premises, part of the dwelling-house in the said declaration mentioned, under a certain contract entered into by him, *whereby the plaintiff was guilty of felony*, contrary to the form of the statute in such case made and provided, and against the peace of our lady the queen, *wherefore the defendant* did at the time when &c. in the said declaration mentioned, assault and beat the plaintiff, and gave the plaintiff in charge to one T. B., then being one of the metropolitan peace officers, according to the statute, and a peace officer of our said lady the queen, duly authorised in that behalf, and then requested the said T. B., so being such peace officer as aforesaid, to take the plaintiff into his custody and safely keep him, and convey and carry him the plaintiff into the said street, and in and along the said public streets, to a certain station-house, as in the said declaration mentioned, and to imprison the plaintiff upon the said charge, and to carry and convey him afterwards before some one of the justices assigned to keep the peace of our said lady the queen within the said county, and to hear and determine divers felonies and misdemeanors committed within the said county, to be examined by and before such justice touching and concerning the premises, and to be further dealt with according to law. And on that occasion the said T. B., so being such peace officer as aforesaid, at the request of the defendant, did then assault the

Plea that plaintiff had been guilty of felony in stealing feathers from a feather bed let to hire to him in certain rooms of defendant, wherefore defendant gave him in charge to a police officer. (*i*)

Whereupon the officer apprehended plaintiff;

(*g*) If the plaintiff resisted, see the form, *post*, 336.

(*h*) This and the other averments must agree with the facts.

(*i*) See plea in *Atkinson* v. *Warne*, 3 Dowl. 483; and 1 Crom. M. & Ros. 828; 6 Car. & P. 687, S. C.

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plaintiff, and did then take the plaintiff into his custody; and because the plaintiff did resist and beat the said T. B., and would not, being then requested, peaceably and quietly proceed with the said T. B. to the said station-house, he the said T. B. did then necessarily a little strike and beat the plaintiff, and did oblige him to go, and did carry and convey him from the said dwelling-house into the said public street, and in and along divers other public streets, to the said station-house in the said declaration mentioned, and did then imprison the plaintiff therein upon the said charge for the said space of time in the said declaration mentioned, being then a reasonable time in that behalf, and as soon as conveniently could be, compelled the plaintiff to go into a street, and in and along divers public streets, to a public police office, situate, &c. and then imprisoned the plaintiff; and the plaintiff was accordingly carried and conveyed in custody to the said public office, before J. R. Esq. one of the justices assigned to keep the peace of our said lady the queen within and for the county aforesaid, and also to hear and to determine divers felonies, trespasses and other misdemeanors in the said county committed, to be examined by and before the said J. R. Esq., so being such justice as aforesaid, touching and concerning the premises, and to be further dealt with according to law. *And so by means* of the premises, the defendant made an assault upon and beat the plaintiff, and caused him to be apprehended on the said charge of felony, and forced him to go from the said dwelling-house into a public street, and in and along divers public streets to the said station-house, and imprisoned the plaintiff upon the said charge, and compelled him to go into the said public street in that behalf mentioned, and in and along divers other public streets to the said public office, and imprisoned the plaintiff upon the said charge for the said space of time in the said declaration mentioned, the same being a reasonable time for that purpose, and which are the said alleged trespasses in the said declaration mentioned, and whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

and because plaintiff resisted and would not peaceably proceed, greater force was necessarily used.

And plaintiff was taken to police offic.

Another plea of felony. (*l*)

And for a further plea in this behalf, the defendants say, that the plaintiff, before the commission of any of the said trespasses in the declaration mentioned, to wit, on the —— day of ——, A. D. 18—, at the parish of ——, in the county of ——, with force and arms [one purse of the value of one shilling, and eight pieces of the current gold coin of the realm called sovereigns of the value of £8, fifty pieces of the current silver coin of the realm called shillings, &c.] of the goods and chattels of one F. T. of great value, to wit, of the value of £——, then and there being found, feloniously did steal, take and carry away, against the peace of our lady the queen, her crown and dignity, wherefore the defendants did at the said time when &c. in the declaration mentioned, to wit, at the parish of —— aforesaid in the county of —— aforesaid, give the plaintiff in charge to one R. K. then and there being a headborough and peace officer of our lady the queen in and for the said parish of ——, and then requested the said headborough and peace officer to take the said plaintiff into his custody, and him safely keep until he could be carried and conveyed, and to carry and convey him before some

(*l*) See *Merry* v. *Green*, 7 M. & W. 623.

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or one of the justices assigned to keep the peace of our said lady the queen within the said county of ——, and to hear and determine divers felonies and misdemeanors committed within the said county of ——, to be examined by and before the said justice touching and concerning the premises, and to be further dealt with according to law, and on that occasion he the said R. K. did, to wit, at —— aforesaid, in the county of —— aforesaid, take the plaintiff into his custody, and seized and laid hold of the plaintiff, and a little pulled and dragged him about, and compelled him to go from and out of the dwelling-house of the plaintiff at —— aforesaid, and to be conveyed in custody along the said streets and highways at —— to the said lock-up, the same being situate at —— aforesaid, in the county of —— aforesaid, and a proper and fit and usual and convenient place in that behalf, and did then imprison and keep and detain him in the said lock-up, in order that he might be, and until he could be conveniently, carried before such justice as aforesaid, the same being a reasonable time and detention and imprisonment in that behalf; and did at the expiration thereof, and as soon as conveniently might and could be, convey the plaintiff, and forced and caused him to be conveyed in custody in and along the said other streets and ways to the said house in the declaration lastly mentioned, the same being situated in —— aforesaid, to and before the Rev. J. P., clerk, then being one of the justices assigned to keep the peace of our said lady the queen within and for the said county of —— (the said Rev. J. P. then being at the said last mentioned house), to be examined by and before the said Rev. J. P. touching and concerning the premises, and to be further dealt with according to law; and detained and imprisoned the plaintiff there a reasonable and convenient time, until he the plaintiff could be carried before the said J. P. as aforesaid; by means of which said several premises, the plaintiff was assaulted, seized, laid hold of, pulled and dragged about, and forced and compelled and conveyed, and detained and imprisoned, and kept and detained in prison at —— aforesaid, upon the occasion and for the space of time in the declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the causes aforesaid; which are the alleged trespasses in the said declaration mentioned, and whereof the plaintiff has above complained against the defendants; without this, that they the defendants were guilty of the said alleged trespasses, or any or either of them, elsewhere than at the parish of —— aforesaid, in the county of —— aforesaid. And this the defendants are ready to verify, &c. (*m*)

Imprisonment under Process.

3. Imprisonment under Process.

Justification of an arrest, &c. by a sheriff's

And for a further plea in this behalf, (*n*) [as to the making the said assault, and with a little force and violence, pushing, forcing and thrusting (*o*)

(*m*) If a special traverse be introduced, the plea should conclude to the country, but as no venue is now introduced in the body of a declaration for an assault, the special traverse seems unnecessary.

(*n*) This enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and is in many cases wholly unnecessary.

(*o*) The recital of the trespasses intended to be justified must depend on the facts of each particular case. When the plea justifies a wounding and actual beating, or more than a *molliter manus imposuit* to make the

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officer and another in his assistance, under a capias against plaintiff. (*o*)

the plaintiff from and out of the said messuage or dwelling-house in the said declaration mentioned, into the said street therein also mentioned, and whilst the plaintiff continued on the ground in the said street, pulling, hauling and dragging him upon his back through the mud and dirt in and along the said street, and for the distance and length of way in the said declaration also mentioned, and thereby a little hurting, bruising and wounding the plaintiff; and as to the imprisoning the plaintiff, and keeping and detaining him in prison for the said space of time in the said declaration mentioned, and as to the rending, tearing, damaging and spoiling the clothes and wearing apparel of the plaintiff in the said declaration mentioned, by the defendants above alleged to have been done,] the defendants say, that before the said time when &c. in the said [first and second counts] mentioned, to wit, on &c., Sir ——, [*insert the name of the judge*], one of the judges of her majesty's Court of [Queen's Bench] at Westminster, by a special order directed that the plaintiff should be held to bail for the sum of £——; and thereupon afterwards, and before the said time when &c. to wit, on &c. [*date of writ*] a certain writ of our lady the now queen, commonly called a capias, was issued (*q*) out of the Court of our said lady the queen, before the queen herself, the said Court still being holden at Westminster, in the county of Middlesex, (*r*) directed to the then sheriff of ——, by which said writ our said lady the queen commanded the said sheriff that he should omit not, by reason of any liberty in his bailiwick, [*&c. set out the capias verbatim, as ante*, vol. ii. 321,] which said writ was then duly in-

Issuing of the capias. (*p*)

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arrest, the particular resistance or occasion of such wounding, &c. must be stated in the subsequent part of the plea as in this form; see 1 Saund. 296, n. 1, and *post*,

(*o*) See 1 & 2 Vict. c. 110, s. 3. See forms justifying under process, 3 Lev. 61; 1 Saund. 296, 298, note 5; 1 Rich. C. P. 151; 2 *id.* 60; 16 East, 82; 9 Wentw. Index, xcviii. to civ. cix. And see justification under process since Uniformity of Process Act, 2 W. 4, c. 39, under a *capias* returnable in Exchequer, *Reddell* v. *Pakeman*, 3 Dowl. 714; 1 Gale, 104; *Beck* v. *Young*, 3 Dowl. 280; 1 Crom. M. & Ros. 448. As to the mode of pleading, see 1 Saund. 296, n. 1; 298, n. 1; Com. Dig. Pleader, 3 M. 24; *ante*, vol. i. Index, "*Process*;" as to the statement of different process, see *ante*, vol. ii. 321, &c. How to plead in an inferior Court, Cowp. 18; 2 T. R. 172; Com. Dig. Plead. 3 M. 24. Justification under a *latitat*, executed in London by a Serjeant at Mace, 9 Wentw. 331. If there be any doubt as to the regularity of issuing the writ, the officer should justify separately, and if the officer have been guilty of any excess, the plaintiff in the original action should also plead separately; 2 Stra. 1184; 1 Salk. 408, 409. The sheriff, in an action against him, must allege a return of meane process, but the officer need not do so; Cro. Car. 446; 5 B. & C. 488.

In trespass for false imprisonment, the defendant, a sheriff, justified under a writ in Chancery, by which he as sheriff was commanded to attach the plaintiff, to answer "as well touching a contempt" (not stating in what) as such other matters as &c., and the plaintiff replied that the writ was for a contempt in not answering, that the plaintiff was in actual custody of the defendant for thirty days under the writ, and was not brought to the bar of the Court in that time, nor was her contempt cleared, the last of the thirty days being in term, and that the plaintiff in Chancery did not bring the plaintiff to the bar in thirty days, though the contempt was not sooner cleared, under the stat. 11 Geo. 4 and 1 W. 4, c. 36. s. 15, rule 5; and that thereupon it became the defendant's duty, and he was requested to discharge the plaintiff, but refused: on demurrer it was held, (assuming the defendant to have been bound to discharge the plaintiff without any order of Court,) first, that the action should have been in case; secondly, that even if the defendant had been a trespasser, he was not a trespasser *ab initio*, and the replication should have new assigned; and *semble*, that no action lay for want of notice to the defendant of the facts bringing the case within the rule; *Smith* v. *Egginton*, 7 A. & E. 167.

(*p*) The process must be stated specially; 1 Saund. 298, n. 1; see *capias* stated, *ante*, vol. ii. 321.

(*q*) See 3 Lev. 63. If the plaintiff in the original action justify alone, the plea may state that he caused it to be issued, &c.

(*r*) As to this allegation, see *ante*, vol. ii. 321, n. (*q*); 1 Saund. 300 b, n. 7.

dorsed for bail for £——, by order of —— [*naming the judge making the order*]; and which said writ so indorsed for bail as aforesaid, afterwards, *to wit*, on &c., was delivered to G. H. Esq., who then and from thenceforth until and at and after eight days after the execution of the said writ upon the now plaintiff as hereinafter mentioned, was sheriff of the said county of ——, to be executed in due form of law; and thereupon the said G. H. so being sheriff as aforesaid, afterwards, and before the said time when &c. in the said declaration mentioned, to wit, on the same day and year last aforesaid, made his certain warrant in writing under his hand and seal of office of sheriff aforesaid, directed to the keeper of the gaol of the said county of ——, and to the said C. D. the said sheriff's bailiff, and thereby commanded him the said C. D. that he should take the plaintiff if he should be found in his bailiwick, and safely keep him, so that the said sheriff might have the body of the plaintiff before our said lady the queen at Westminster aforesaid, on &c. to answer the said E. F. in the said action, [*examine carefully with the warrant*], which said warrant afterwards, and within one calendar month from the date of the said writ, and before the said time when &c. in the said declaration mentioned, to wit, on the day and year last aforesaid, was delivered to the said C. D. to be executed in due form of law. By virtue of which said writ and warrant the said C. D. as such bailiff as aforesaid, and the said E. F. as his servant, and by his command, afterwards, and before the time appointed for the return of the said writ, to wit, at the said time when &c. in the said declaration mentioned, and within the bailiwick of the said sheriff, took and arrested the plaintiff by his body [in the said messuage or dwelling-house in the said declaration mentioned] and kept and detained him in the custody of the said C. D. at the suit of the said E. F. for the cause aforesaid, for the said space of time in the said first count mentioned, as it was lawful for them to do for the cause aforesaid. (*x*) And because at the said time when &c. the plaintiff having been so arrested as aforesaid, it was necessary and expedient, in order to keep him in safe custody, under and by virtue of the said writ and warrant, and to prevent him from escaping out of such custody, that the plaintiff should be taken by and in the custody of the said C. D. out of the said messuage or dwelling-house in the said declaration mentioned (the same not being a place where the plaintiff could be kept in safe custody by the said C. D. in pursuance of the said writ and warrant), to some place in the said bailiwick, where he might be kept in the safe custody of the said C. D., under and by virtue of the said writ and warrant, and because the plaintiff being then requested by the said C. D. peaceably and quietly to go out

Indorsed for bail. (*s*)

Delivery of writ to the sheriff. (*t*)

Warrant to one of the defendants. (*u*)

Delivery of warrant to one of defendants.

Arrest by one of the defendants as bailiff, and by the other in his aid.

Necessity to remove plaintiff to a place of safe custody, and his resistance. (*x*)

(*s*) See *ante*, vol. ii. 321. The indorsement for bail should be stated, 10 B. & C. 202; but it is unnecessary to state the particulars of the cause of action, even in a justification by the plaintiff in the original action, and though under process of an inferior Court; 3 T. R. 183; Cowp. 18.

(*t*) This allegation is not necessary though usual; *Green* v. *Jones*, 1 Saund. 298.

(*u*) Examine with the warrant. See the form in 3 Lev. 63; and the mode of pleading a warrant, 1 Saund. 298, n. 5. It is not necessary in this case to state that the warrant was under seal; 2 Saund. 305, n. 13; and see the form in 1 Saund. 296; when it is necessary, see Com. Dig. Pleader, 3 M. 24; Willes, 411; Bul. N. P. 83.

(*x*) Where only an arrest is justified, the plea ends here with a verification, see the form, 3 Lev. 63; but if a wounding or actual battery be justified, the occasion thereof must be stated in the above form, *ante*, 319, note; and 1 Saund. 296, note 1. As to taking the defendant to a lock-up house, see the 32 Geo. 2, c. 28; 3 Chitty's Gen. Prac. 368, sect. 1—12.

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of the said messuage or dwelling-house with the said C. D. for the purpose aforesaid, would not peaceably or quietly go with, nor could otherwise be taken by the said C. D. from and out of the said messuage or dwelling-house to such place, for the purpose of being kept in safe custody as aforesaid, the said C. D., as such bailiff as aforesaid, and the said E. F. as his servant, and by his command, whilst the said writ was in full force, to wit, at the said time when &c. in the said declaration mentioned, within the bailiwick of the said sheriff, were forced and obliged to, and did then necessarily und unavoidably, in order to keep the plaintiff in safe custody under and by virtue of the said writ and warrant, and to prevent him from escaping out of the custody of the said C. D., so being such bailiff as aforesaid, with a little force and violence push, force and thrust the plaintiff from and out of the said messuage or dwelling-house in the said declaration mentioned, into the said street there; and because the plaintiff, at the said time when &c. in the declaration mentioned, (*y*) being down on the ground in the said street, wholly refused peaceably or quietly to go with, nor could be otherwise taken (*z*) by the said C. D. to a place wherein he might be kept in safe custody, under and by virtue of the said writ and warrant, and being so in custody as aforesaid, attempted to escape from and out of the same custody, the defendants, for the purpose of taking him to some place of safe custody as aforesaid, and to prevent him from escaping out of the custody of the said C. D., were forced and obliged to pull, haul and drag the plaintiff upon his back through the mud and dirt in and along the said street there, for the distance and length of way in the said declaration mentioned; and in so doing unavoidably a little hurt, bruised and wounded the plaintiff, and a little rent, tore, damaged and spoiled the said clothes and wearing apparel of the plaintiff in the said declaration mentioned, the defendants doing as little damage to the plaintiff and his said clothes and wearing apparel as they possibly could on those occasions; which are the said alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above complained against them the defendants.* And this the defendants are ready to verify, &c.

Plaintiff's attempt to escape.

The like by the sheriff or officer to whom the writ was directed. (*a*)

Same as the last form, as far as the asterisk, omitting the statement of the warrant, and alleging that the sheriff himself made the arrest, and state the return of the writ as follows:] And the defendant further saith, that afterwards, and at the return of the said writ, to wit, on the said —— next after ——, he the defendant duly returned the said writ to the said Court of our said lady the queen, before the queen herself at Westminster aforesaid, and then returned thereon, that by virtue thereof he the defendant had taken the plaintiff, whose body he had ready, as by the said writ he was commanded;

(*y*) Or, "then resisted the said arrest and imprisonment, and endeavoured to escape therefrom, therefore the said —— as such bailiff as aforesaid, and the said —— in his aid and assistance, and by his command, then necessarily gave and struck &c. in struggling with the plaintiff to prevent his escape as aforesaid, &c, *ut supra*.

(*z*) The plea would be demurrable without this allegation, or an averment in effect similar; *per* Bayley, J., 5 B. & Ald. 223

(*a*) See forms, Lutw. 236. If the *sheriff* or the *officer*, to whom *mesne* process is directed, justify imprisonment by force of such process, he must show the writ to be returned, but the bailiff who has a warrant from the sheriff, or any person who acts in his aid, need not, 1 Salk. 409; 12 Mod. 396; Com. Dig. Pleader, 3 M. 24; 6 T. R. 235; *ante*, vol. i. Index, "*Process*." In case of writs of execution no return need be stated; 10 East, 82; Willes, 126.

as by the said writ and the said return thereof remaining of record in the said Court of our said lady the queen, before the queen herself here, to wit, at Westminster aforesaid, more fully appears. And this the defendant is ready to verify, &c.

See the form before the act abolishing imprisonment for debt on mesne process, 3 Dowl. 714; 2 Crom. M. & Ros. 30.

Justification by original plaintiff under a *capias* at his suit.

Justification by attorney under a *capias ad satisfaciendum*. (c)

And for a further plea in this behalf, [as to the said assaulting the plaintiff in the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for the said time in the said first count mentioned, above alleged to have been done by the defendant,] he the defendant says, that one E. F., before the said time when &c. to wit, on the —— day of ——, A.D. ——, [*state the recovery of the judgment in debt or assumpsit, and the reference to the record, as in the form, ante*, vol. ii. 337 to 342, *and then proceed as follows:*] And the defendant in fact further saith, that he the defendant, before and at the said time when &c. was and from thenceforth hath been and still is one of the attornies of the said Court of our said lady the queen, before the queen herself, [*or, if in C. P.* "of the Bench aforesaid,"] and that being such attorney, and the said judgment so recovered by the said E. F. as aforesaid being in full force, and the damages therein mentioned and so adjudged to the said E. F. as aforesaid being unpaid and unsatisfied, he the defendant, before the said time when &c. to wit, on the —— day of —— in the year aforesaid, as the lawful attorney of and for the said E. F. in that behalf, and by virtue of his retainer in that behalf, caused to be issued out of the said Court of our said lady the queen, before the queen herself, [*or, if in C. P.* "of the Bench aforesaid,"] at Westminster aforesaid, upon the said judgment, a certain writ of our said lady the queen called a *capias ad satisfaciendum* against the plaintiff, directed to the sheriffs of London, by which said writ our said lady the queen commanded, &c. [*here state the ca. sa. as ante*, vol. ii. 558, *and then proceed as follows:*] which said writ he the defendant, as such attorney for the said E. F. as aforesaid, and as he lawfully might, afterwards, and before the return thereof, and also before the said time when &c. to wit, on the —— day of ——, A.D. ——, delivered to one ——, Esq. and ——, Esq. who then and from thenceforth until and at and after the said time when &c. were sheriffs of [London], to be executed in due form of law; (d) by virtue of which said writ the said sheriffs of [London] afterwards, and before the return of the said writ, to wit, on the day and year in the said declaration mentioned, being the said time when &c. and within their bailiwick as such sheriffs, that is to say, at [London] aforesaid, took and arrested the plaintiff by his body, and kept and detained him in their custody, under and by virtue of the said writ, and for the cause therein specified, for the said time in the said declaration mentioned, as they lawfully might, which is the said alleged trespass in the introductory part of this plea mentioned, and

Recovery of the judgment.

Defendant as attorney issued *ca. sa.*

Delivery of writ by defendant to sheriffs of London.

The caption.

(c) See forms, 9 Wentw. 351, and Index, cvi. &c.; Com. Dig. Pleader, 3 M. 24. In a justification under a *ca. sa.* by the plaintiff in the former suit, or his attorney, he must state the judgment as well as the execution, 1 Salk. 409; and the officer should not join with him if there be any doubt as to the regularity of the judgment, 2 Stra. 1184.

(d) In another form the sheriff's warrant was stated; 9 Wentw. 351; but see 16 East, 82.

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whereof the plaintiff hath above complained against him the defendant. And this the defendant is ready to verify, &c.

The like by a sheriff's officer under a writ of *ca. sa.* (*e*)

And for a further plea in this behalf, [as to the said assaulting the plaintiff in the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for the said time in the said declaration mentioned, and above alleged to have been done by the defendant, (*f*) he the defendant says, that one E. F. before the said time when &c., to wit, on the —— day of ——, A. D. ——, sued and prosecuted out of the said Court of our said lady the queen, before the queen herself, [*or if in C. P.* " out of the Court of our said lady the queen of the Bench,"] (the said Court then and still being held at Westminster, in the county of Middlesex,) a certain writ of our said lady the now queen, called a *capias ad satisfaciendum*, against the plaintiff, (*g*) directed to the sheriff of ——, by which said writ our said lady the queen commanded (*h*) the said sheriff that he should take the plaintiff, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lady the queen, [*or if in C. P.* " before her majesty's justices of the Bench,"] at Westminster, on —— next after —— then next and now last past, [*or* " immediately after the execution thereof,"] to satisfy the said E. F. for £——, which the Court of our said lady the now queen, before the queen herself, [*or if in C. P.* " before her majesty's justices of the Bench,"] at Westminster aforesaid, were awarded to the said E. F. for his damages, which he had sustained as well by reason of the not performing certain promises, made by the now plaintiff to the said E. F., as for his costs and charges, whereof the plaintiff was convicted, and that the said sheriff should have there that writ; which said writ was afterwards, and before the return thereof, and also before the said time when &c., to wit, on the —— day of ——, A. D. ——, delivered to one ——, Esq., who then and from thenceforth until and at and after the said time when &c. was sheriff of —— aforesaid, to be executed in due form of law; whereupon he the said ——, so being such sheriff of —— as aforesaid, afterwards and before the return of the said writ, and also before the said time when &c., to wit, on &c. last aforesaid, for having execution of the said writ, made his warrant in writing, sealed with the seal of his said office of sheriff of —— aforesaid, and then directed the same to the defendant, who then and until and at and after the said time when &c. was bailiff of the said sheriff of ——, and by the said warrant commanded him that he should take the plaintiff, if he should be found within the said sheriff's bailiwick, and him safely keep, so that he the said sheriff might have his body before our said lady the queen, [*or if in C. P.* " before her majesty's justices of the Bench,"] at Westminster, on the said —— next after ——, [*or* " immediately after

Warrant to defendant.

(*e*) See the notes to the last form, Com. Dig. Pleader, 3 M. 24. If the sheriff or his officer plead separately, he need not state the judgment; *id. ibid.*

(*f*) This enumeration of the trespasses must depend on the statement in the declaration, and is in many cases not necessary.

(*g*) Where the writ in the original action authorised the arrest of the plaintiff by the name of F. F., his real name being F. W. F., and in which he sued, it was held that the plea of justification was supported by the production of the writ and of evidence of the identity of F. F. and F. W. F., and that the issue of the identity of the plaintiff and the defendant in the former action was sufficiently raised by the plea, without any averment that the plaintiff was known by one name as well as the other; *Fisher* v. *Magnay*, 3 Dowl. N. S. 40.

(*h*) Examine carefully with the writ.

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the execution thereof,"] to satisfy the said E. F. for his said damages aforesaid by him in form aforesaid recovered, according to the exigency of the said writ; which said warrant afterwards, and before the return of the said writ, and also before the said time when &c., to wit, on &c. last aforesaid, was delivered to the defendant to be executed in due form of law; by virtue of which said warrant the defendant as such sheriff's officer as aforesaid, afterwards and before the return of the said writ, to wit, on the same day and year in the said declaration mentioned, being the said time when &c. within the bailiwick of the said then sheriff of —— aforesaid, in execution of the said warrant gently laid his hands upon the plaintiff to take and arrest him by virtue of the said writ and warrant, and did then arrest him and take him into custody by virtue of the said writ and warrant, and kept and detained him in custody by virtue of the said writ and warrant, and for the cause therein mentioned, and in the said writ specified for the said time in the said declaration mentioned, as he lawfully might for the cause aforesaid; which are the said alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above thereof complained against him. And this the defendant is ready to verify, &c.

Caption under the warrant.

Plea justifying the imprisonment of plaintiff by defendant as an officer of the Palace Court, in execution of a *ca. sa.* issued out of that Court against plaintiff upon a judgment therein. (*i*)

If only part of the trespasses can be justified in law, then confine the plea to those trespasses which can be justified.] Says, that before the said time when &c. at the Court of the queen's palace of Westminster, held at Southwark, in the county of Surrey, within the jurisdiction of the said Court, on &c. before H. T. C. who then and there, and from thence until the time of the issuing of the writ hereinafter mentioned, was steward of the same Court, J. W. by the consideration and judgment of the same Court recovered against the plaintiff £——, which the same Court there adjudged to him for his damages, costs and charges, which he had sustained in a certain action on promises by the said J. W. against the plaintiff in the said Court there lately prosecuted, whereof the plaintiff was convicted, as by the record of the proceedings therein still remaining in that Court more fully appears. And the defendant further says, that the said J. W. for having execution of the said judgment, afterwards, to wit, on &c. [*day of issuing the writ or about it,*] sued and prosecuted out of the said Court a certain writ of our said lady the queen, called a *ca. sa.* upon the said judgment against the plaintiff, directed (*j*) to the bearers of the virges of our said lady the queen's household, officers and ministers of the Court of her palace of Westminster, and every of them greeting, commanding them and every of them, or one of them, to take the plaintiff, if he should be found within the jurisdiction of the said Court, and him safely to keep, so that they or one of them might have his body before the judge of the said Court at the then next Court of the palace at Westminster aforesaid, on &c. to be held at Southwark aforesaid, in the said county of Surrey, to satisfy the said J. W. £——, which to him the said J. W. in the said Court were adjudged for damages, costs and charges, which he sustained in a certain plea of trespass on the case by the said J. W. against the plaintiff, in the said Court then lately prosecuted,

(*i*) As the statute 7 & 8 Vict. c. 96, s. 57, has abolished arrest on final process in an action for debt not exceeding 20*l.* exclusive of the costs, this form will soon be useless.

(*j*) Take care to set out the writ accurately, and examine therewith.

IMPRISONMENT UNDER PROCESS.

whereof the plaintiff was convicted; and that the said bearers should then there have that writ, which said writ afterwards, and before the delivery thereof to the said bearers aforesaid, was duly indorsed with a direction to the said bearers to beware that the said L. was not privileged or protected, and requiring them to take £——, which said writ so indorsed afterwards, and before the return thereof, and before the said time when &c., to wit, on &c., at Southwark aforesaid, in the county aforesaid, and within the jurisdiction of the said Court of the palace aforesaid, was delivered to the defendant, who then and from thence and at and after the return of the said writ, was one of the bearers of the virges of the said queen's household, and an officer and minister of the said Court of the palace aforesaid, to be executed in due form of law. By virtue of which said writ, he the defendant, so being one such bearer, officer and minister as aforesaid, afterwards and before the return of the said writ, to wit, on the said &c. [*day in the declaration,*] within the jurisdiction of the said Court, in execution of the said writ, gently laid his hands upon the plaintiff, in order to arrest him for the cause aforesaid, and did then accordingly arrest him for the cause aforesaid, and imprisoned and kept and detained him in prison there, and within the jurisdiction aforesaid, for a certain time, to wit, for the space of time in the said declaration mentioned, as it was lawful for him to do for the cause aforesaid; which are the same alleged trespasses [in the introductory part of this plea mentioned,] whereof the plaintiff hath above complained against the defendant; [without this, that he the defendant was or is guilty of the premises aforesaid elsewhere out of the jurisdiction of the said Court.] And this the defendant is ready to verify, &c. (*k*)

Plea of justification under warrant of a magistrate for an assault. (*l*)

After enumerating the trespasses intended to be justified, if necessary so to do.] Says, that just before the said times when &c. in the said declaration mentioned, to wit, on the said &c. the plaintiff, with force and arms, &c. [*here state the cause for which the warrant was taken out, which, in the case in question, was as follows:*] made an assault upon the defendant, and then beat and ill-treated the defendant, in breach and violation of the peace of our lady the now queen, whereupon the defendant afterwards, to wit, on &c. duly applied to C. Esq. he then being one of the justices of our said lady the queen, assigned to keep the peace of our said lady the queen, in and for the said county of M. and then duly made oath of the said last-mentioned trespasses committed by the plaintiff on the defendant as last aforesaid; and thereupon the said C. so being such justice as aforesaid, afterwards, to wit, on the day and year last aforesaid, duly made and issued his said certain warrant under his hand and seal, bearing date, to wit, the day and year last aforesaid, directed (*m*) to all constables and her majesty's officers of the peace, whom the said warrant might concern, and thereby commanded them, and every of

(*k*) If the special traverse be introduced, the plea should conclude to the country, but unless some venue be stated in the body of the declaration the special traverse will be improper.

(*l*) Though this defence may be given in evidence under the general issue, (see Com. Dig. Pleader, 3 M. 23; Holt's C. N. P. 478), yet it is frequently advisable to plead the matter specially, as it tends to diminish the evidence on the part of the defendant, and compels the plaintiff to new assign any excess which he might otherwise give in evidence by surprise, in answer to the defence under the general issue.

(*m*) Let this agree with the direction of the warrant.

them, upon (*m*) sight thereof, to take and bring before him the said justice, or some other of her majesty's justices of the peace for the said county, the body of the plaintiff, to answer all such matters and things as in her majesty's behalf should be objected against him the plaintiff by the defendant, for assaulting and beating the defendant on the —— day of —— in the said county, in breach of the peace of our said lady the queen, which said warrant afterwards, and before the said time when &c. in the said declaration mentioned, to wit, on &c. the defendant duly caused to be delivered to one —— who then and from thence and until the said time when &c. was a constable and peace-officer in and for the said county of M. in due form of law to be executed, by virtue of which said warrant he the said —— so being such constable and peace-officer as aforesaid, and the defendant, in his aid and assistance, and by his command, afterwards, to wit, at the said time when &c., that is to say, on &c. gently laid their hands on the plaintiff in order to take and did then take the plaintiff into the custody of the said ——, until the plaintiff afterwards, and as soon as conveniently could be, was carried in the said county of M., to and before the said C. then being one of her majesty's justices aforesaid, to keep the peace in and for the said county of M. for examination concerning the premises, and on that occasion the plaintiff was necessarily and unavoidably imprisoned, and kept and detained in prison for the said space of time in the said declaration mentioned, and the defendant committed the said alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above thereof complained, which are the said several alleged trespasses in the said declaration mentioned, and whereof the plaintiff hath above complained against him; [without this, that the defendant was guilty of the said alleged trespasses in the said declaration mentioned, or any or either of them, elsewhere than in the said county of M. and in taking and carrying the plaintiff in the said county of M. to and before the said C. as aforesaid, or at any time there, on the said —— day of ——, and in execution of the said warrant.] And this the defendant is ready to verify, &c. (*n*)

IMPRISONMENT UNDER PROCESS.

See the form of plea and law in *Gladwell* v. *Blake*, 5 Tyr. 186; 1 Crom. M. & Ros. 638, S. C.

Justification under a warrant issued by one of the judges to apprehend plaintiff to answer an indictment for perjury against him.

III. TO PERSONAL PROPERTY.

TO PERSONAL PROPERTY.

And for a further plea in this behalf, the defendant says, that the said [goods and chattels] in the declaration mentioned were not, nor was any or either of them, at the said time when &c. the [goods or chattels] of the

Plea denying that the goods were the plaintiff's. (*o*)

(*m*) Let this agree with the command as stated in the warrant.

(*n*) See note in the last page as to special traverse.

(*o*) In trespass *de bonis asportatis*, a plea denying that the goods are the plaintiffs, puts in issue the property in as well as the possession of the goods, *Harrison* v. *Dixon*, 12 M. & W. 142; 1 D. & L. 454, S. C.; and where the plaintiff proved that the sheriff had seized the goods, being the property of B., under an execution against B., and had sold them to the plaintiff; it was held, that the defendant might show on the issue joined on this plea that the sale was fraudulent as against creditors, that he himself had taken the goods under an execution against B., and that this was the alleged trespass; *Ashby* v. *Minnitt*, 3 A. & E. 121.

To Personal Property.

plaintiff, in manner and form as the plaintiff has above thereof alleged. And of this the defendant puts himself upon the country, &c.

Plea to action by assignees of a bankrupt, that the goods were the defendants, and that he had delivered them to a third party, who had wrongfully delivered them to the plaintiffs, wherefore defendant took them. (p)

And for a further plea in this behalf, the defendant says, that before the said time when &c., and before the said F. W. became a bankrupt, to wit, on the —— day of ——, A.D. ——, and from thence continually until and at the time when &c. in the declaration mentioned, the said [ship and rudder] were the proper [ship and rudder] of him the defendant; and before and at the time of the delivery to J. D. as thereinafter mentioned, the defendant was lawfully possessed of the said [ship and rudder] in the declaration mentioned as of his own property; and that before the said time when &c., and whilst he was so possessed of the said [ship and rudder] as aforesaid, to wit, on the —— day of ——, A.D. ——, the defendant delivered the said [ship and rudder] to the said J. D., to be kept by the said J. D., to and for the use of the defendant; and the said J. D. then received the same for the use of the defendant, and afterwards, and before the said time when &c., and after the said F. W. became bankrupt as aforesaid, to wit, on the day and year last aforesaid, the said J. D. in violation of his said trust, wrongfully delivered the said [ship and rudder] to the plaintiffs, assignees as aforesaid, whereupon the defendant afterwards, to wit, at the said time when &c. seized, took and carried away from and out of the said possession of the plaintiffs, assignees as aforesaid, the said [ship and rudder] so being the said [ship and rudder] of the defendant, doing no unnecessary damage to the plaintiffs on that occasion, as he lawfully might do for the cause aforesaid, which are the supposed trespasses in the declaration mentioned, and whereof the plaintiffs have above complained against the defendant. And this the defendant is ready to verify, &c.

Plea that the piano-forte mentioned in declaration was and is the property of one Lewis, and had been feloniously stolen from him, and was placed in plaintiff's house, and defendant entered to remove same.

See the form in *Wilton* v. *Edwards*, 6 Car. & P. 677.

Plea justifying seizing a *hare*, that plaintiff had a dead hare, the property of W. S., and defendant, as his servant, demanded said hare, and which plaintiff refusing to give up, defendant seized same.

See the form of plea and other pleas founded on Game Trespass Act, 1 & 2 Will. 4, c. 32, in *Wisdom* v. *Hodson*, 3 Tyr. 813.

Plea justifying seizure of goods as the property of defendant as assignees of a bankrupt, and replication.

See the form of plea and replication in *Jones* v. *Brown and others*, 1 Bing. N. C. 484.

Plea that the defendant was an innkeeper, and that he took the goods as a pledge for a sum of money due from the plaintiff for lodging, &c. (q)

See *Hartley* v. *Moxham*, 3 G. & D. 1.

Plea to trespass relating to goods, that plaintiff and defendant were tenants in common.

See plea in Detinue, *ante*, 245.

(p) See *Goss* v. *Quinton*, 3 M. & G. 825.

(q) An innkeeper cannot detain the person of his guest, or take off his clothes, in order to secure payment of his bill; *Sunbolf* v. *Alford*, 3 M. & W. 248.

That plaintiff had purchased a vessel under a *false* and fraudulent *pretence*, and therefore defendant retook possession.

And the defendant for a further plea in this behalf, as to seizing and taking the said goods and chattels in the said declaration mentioned, and carrying away the same, and converting and disposing thereof to his own use as in the said declaration mentioned, says, that heretofore and a little before the said time when &c. to wit, on &c. he the defendant was possessed of the said goods and chattels in the said declaration mentioned, as of his own proper goods and chattels, and was then desirous of selling and disposing of the same, and thereupon afterwards, and before the said time when &c. the plaintiff then being in needy circumstances, and fraudulently intending and contriving to obtain possession of the said goods and chattels by the purchase thereof on credit, without ever paying for the same, did then falsely and fraudulently pretend and represent to the defendant that he the plaintiff was a commissioned officer, to wit, a lieutenant in her Majesty's Royal Navy. Whereas, in truth and in fact, the plaintiff was not a commissioned officer in her said Majesty's Royal Navy. And the plaintiff also did then propose to the defendant to purchase the said goods and chattels from him the defendant on certain terms then agreed upon. (*r*) And the defendant further saith, that he the defendant, confiding in the plaintiff, and in his said representation, and being wholly ignorant of the fraudulent contrivance aforesaid, did assent and agree to the said proposal; and in pursuance of such assent and agreement he the defendant did then deliver up possession of the said goods and chattels. And the defendant further says, that the plaintiff, in pursuance of his said fraudulent contrivance, having so obtained possession of the said goods and chattels, did not nor would pay for the same although the time for such payment had elapsed before the said time when &c. but on the contrary thereof wholly refused so to do, whereby and by reason of the premises aforesaid the said sale and delivery became and was of no force and effect; and the defendants having discovered the said fraud became and was entitled to resume the possession of the said goods of which he had been so fraudulently deprived as aforesaid; and thereupon at the said time when &c. he the defendant, in order to resume such possession, did seize and take the said goods and chattels and carry away the same and resume the possession thereof as of the proper goods and chattels of him the defendant, doing no unnecessary damage to the plaintiff in that behalf, and as he lawfully might for the cause aforesaid, which are the same alleged trespasses in the introductory part of this plea mentioned. And this the defendant is ready to verify, &c.

Another plea nearly similar to the last.

And for a further plea in this behalf, as to the said entering into the said vessel, the defendant says, that heretofore and before the said time when &c. to wit, on &c. Sir B. G. Bart. was possessed of the said vessel in the said declaration mentioned as of his own property, and was then desirous of selling and disposing of the same, and the defendant was then employed by the said Sir B. G. and as his agent to conduct and manage the said sale of the said vessel, and thereupon afterwards and before the said time when &c. the plaintiff then being in needy and indigent circumstances, and fraudulently intending and contriving to obtain possession of the said vessel by the purchase thereof on credit, without ever paying for the same, did propose to

(*r*) *Quære*, if not safer to state the agreed credit.

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the defendant as the agent of the said Sir B. G. in that behalf, to purchase the said vessel from the said Sir B. G. on certain terms, to wit, that £——, parcel of the price of the said vessel, should be paid down, and that the residue thereof, to wit, £——, should be paid on a certain time before the said time when &c. to wit, on the —— then next ensuing. And the defendant further saith, that he the defendant, confiding in the plaintiff, and being wholly ignorant of the fraudulent contrivance aforesaid, did, as the agent of the said Sir B. G. agree to the said proposal of the plaintiff, and in part execution thereof did then, as such agent as aforesaid, deliver up possession of the said vessel to the plaintiff. And the defendant further says, that the plaintiff, in pursuance of his said fraudulent contrivance, having so obtained possession of the said vessel, did not nor would on the said —— day &c. then next ensuing the date of the said proposal, or at any other time, pay the said sum of £——, so agreed to be paid as aforesaid, but, on the contrary thereof, wholly refused to pay the same or any part thereof; and that afterwards and after the said —— day of ——, and before the said time when &c. to wit, on &c. he the plaintiff then being in indigent circumstances, and representing himself to the defendant to be wholly unable to pay the said sum of £——, or any part thereof, and being also then a prisoner for debt in a certain gaol of our lady the now queen, at —— in the county of ——, it was then agreed amongst other things by and between the plaintiff and the defendant, so being such agent as aforesaid, that for and in consideration of his being so unable to pay the said sum of £—— as aforesaid, he the plaintiff should deliver up possession of the said vessel, and that the defendant should take and accept possession of the same for and on account of the said Sir B. G. wherefore the defendant in pursuance of the said last mentioned agreement, and for the purpose of taking possession of the said vessel as such agent as aforesaid, at the said time when &c. did enter into the said vessel and make a little noise and disturbance therein, and remain and continue therein for the said time in the said declaration mentioned, as he lawfully might for the cause aforesaid, which are the same alleged trespasses in the introductory part of the plea mentioned. And this the defendant is ready to verify, &c.

Plea to trespass for carrying away goods, that J. C. was a trader and was in possession of the goods as reputed owner, and owed a sufficient petitioning creditor's debt, and became a bankrupt, and thereupon a fiat was issued against him, and he was declared a bankrupt, and an assignee appointed, and thereupon the property in the

And for a further plea in this behalf, as to the said alleged seizing, carrying away and converting of the said cattle, goods and chattels in the declaration mentioned, the defendants say, that before and at the said time when &c. in the declaration mentioned, one J. C. a subject of this realm, was a trader, dealer and chapman, within the true intent and meaning of the laws in force concerning bankrupts, and that during all the time aforesaid, and at the time of his becoming bankrupt as hereinafter mentioned, the said cattle, goods and chattels in the said declaration mentioned were in the possession, order and disposition of the said J. C. then being such trader as aforesaid, with the consent and permission of the plaintiff, the true owner thereof, and the said J. C. was then and during all the time aforesaid the reputed owner of the said cattle, goods and chattels within the true intent and meaning of the said laws concerning bankrupts. And the said defendants further say, that before the levy hereinafter mentioned, and before the said time when &c. to wit, on the —— day of ——, A. D. ——, the said J. C. so then being such trader as aforesaid, was indebted to one T. B. a subject of this realm, in the

sum of £100 and upwards, for a true and just debt due and owing to him, and the said J. C. was then also indebted to divers other persons in divers other large sums of money, and the said J. C. being so indebted as aforesaid, and a subject of this realm, and such trader as aforesaid, afterwards, to wit, on the day and year last aforesaid, the said debts being then due and unpaid and unsatisfied, he the said J. C. became and was a bankrupt within the true intent and meaning of the said laws concerning bankrupts. And that thereupon afterwards, to wit, on the —— day of ——, A. D. ——, a certain fiat, bearing date the day and year last aforesaid, grounded upon the said laws, upon the petition of the said T. B. was duly awarded and issued against the said J. C. and which said fiat was duly entered of record, according to the statute in that case made and provided, and such proceedings were thereupon had in pursuance of the said fiat, that the said J. C. afterwards, to wit, on the day and year last aforesaid, was duly found, declared and adjudged to be a bankrupt within the true intent and meaning of the said laws, and thereupon afterwards, to wit, on the day and year last aforesaid, the said T. B. was duly appointed assignee of the estate and effects of the said J. C. under the said fiat, within the true intent and meaning of the said laws, and thereby the said cattle, goods and chattels in the said declaration mentioned, so being in such possession, order and disposition of the said J. C. as aforesaid, vested in the said T. B., as such assignee as aforesaid. And the defendants further say, that after the said J. C. had so become bankrupt as aforesaid, and before the issuing of the said fiat as aforesaid, to wit, at the said time when &c. the defendants then being sheriff of the county of Middlesex, under and by virtue of a certain testatum writ of *fieri facias* to them directed at the suit of one M. W. against the said J. C. issued out of the Court of Exchequer of Pleas, directing them the defendants to levy of the goods and chattels of the said J. C. in their bailiwick the sum of £45 : 19*s.* and also 15*s.* for the said writ, besides &c., they the defendants, as such sheriff, under and by virtue of the said writ, and within their bailiwick as aforesaid, seized the said cattle, goods and chattels in the declaration mentioned, the same then being in the possession, order and disposition of the said J. C. as aforesaid, and kept and detained the same in their possession until afterwards and after the issuing of the said fiat, and the appointment of the said assignee as aforesaid, to wit, on the —— day of ——, in the year aforesaid, they the defendants, at the request and by the direction of the said T. B. so being such assignee as aforesaid, delivered the said cattle, goods and chattels to him the said assignee, and the said cattle, goods and chattels being so vested in him as aforesaid, as they the defendants lawfully might for the cause aforesaid, and which are the same seizing, carrying away and converting of the said cattle, goods and chattels in the said declaration mentioned. And this they the defendants are ready to verify, &c.

goods vested in him. (*s*)

J. C. declared a bankrupt.

And for a further plea in this behalf, as to the said alleged seizing, carrying away and converting of the said cattle, goods and chattels in the declaration mentioned, the defendants say, that before and at the said time when &c. in the declaration mentioned, one J. C. a subject of this realm, was a trader, dealer and chapman, within the true intent and meaning of the laws

Plea in trespass de bonis asportatis against sheriff for seizing goods, that they were in a trader's possession at time of

(*s*) See forms 2 Bar. & Cres. 908; 4 Dowl. & Ryl. 579. *Quære*, the goodness of this plea, see *Isaac* v. *Belcher*, 5 M. & W. 139; 7 Dowl. 516.

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his bankruptcy as reputed owner, and that defendants, as sheriffs, seized them under a fieri fa. against trader, but afterwards they gave up possession to the assignees of such trader under a fiat in bankruptcy. (t)

in force concerning bankrupts, and that during all the time aforesaid, and at the time of his becoming bankrupt as hereinafter mentioned, the said cattle, goods and chattels in the said declaration mentioned, were in the possession, order and disposition of the said J. C. then being such trader as aforesaid, with the consent and permission of the plaintiff the true owner thereof, and the said J. C. was then and during all the time aforesaid the reputed owner of the said cattle, goods and chattels within the true intent and meaning of the said laws concerning bankrupts. And the defendants further say, that before the levy hereinafter mentioned, and before the said time when &c. to wit, on &c. the said J. C. so then being such trader as aforesaid, was indebted to one T. B. a subject of this realm, in the sum of £100 and upwards, for a true and just debt due and owing to him, and the said J. C. was then also indebted to divers other persons in divers other large sums of money, and the said J. C. being so indebted as aforesaid, and a subject of this realm and such trader as aforesaid, afterwards, to wit, on the day and year last aforesaid, the said debt being then due and unpaid and unsatisfied, he the said J. C. became and was a bankrupt within the true intent and meaning of the said laws concerning bankrupts, and that thereupon afterwards, to wit, on &c. a certain fiat bearing date the day and year last aforesaid, grounded upon the said laws upon the petition of the said T. B. was duly awarded and issued against the said J. C. and which said fiat was duly entered of record according to the statute in that case made and provided, and such proceedings were thereupon had in pursuance of the said fiat, that the said J. C. afterwards, to wit, on &c. last aforesaid was duly found, declared and adjudged to be a bankrupt within the true intent and meaning of the said laws, and thereupon afterwards, to wit, on &c. last aforesaid, the said T. B. was duly appointed assignee of the estates and effects of the said J. C. under the said fiat within the true intent and meaning of the said laws, and thereby the said cattle, goods and chattels in the said declaration mentioned, so being in such possession, order and disposition of the said J. C. as aforesaid, vested in the said T. B. as such assignee as aforesaid. And the defendants further say, that after the said J. C. had so become bankrupt as aforesaid, and before the issuing of the said fiat as aforesaid, to wit, at the said time when &c. the defendants, then being sheriff of the county of Middlesex, under and by virtue of a certain testatum writ of *fieri facias* to them directed at the suit of one M. W. against the said J. C. issued out of the Court of Exchequer of Pleas directing them the defendants to levy of the goods and chattels of the said J. C. in their bailiwick the sum of £45:19*s.* and also 15*s.* for the said writ besides &c., they the defendants as such sheriff, under and by virtue of the said writ and within their bailiwick as aforesaid, seized the said goods and chattels in the declaration mentioned, the same then being in the proper order and disposition of the said J. C. as aforesaid, and kept and detained the same in their possession until afterwards and after the issuing of the said fiat, and the appointment of the said assignee as aforesaid, to wit, on &c. they the defendants at the request and by the direction of the said T. B. so being such assignee as aforesaid, delivered the said cattle, goods and chattels to him the said assignee, and the said cattle, goods and chattels being so vested in him as aforesaid, as they the

(t) *Quære*, the goodness of this form, see *Isaac* v. *Belcher*, 5 M. & W. 139; 7 Dowl. 516.

defendants lawfully might for the cause aforesaid, and which are the same seizing, carrying away and converting of the said cattle, goods and chattels in the said declaration mentioned. And this they the defendants are ready to verify, &c.

Justification of taking and impounding cattle as a distress damage feasant. (t)

And for a further plea in this behalf, as to the seizing and taking the said cattle of the plaintiff in the said first count of the said declaration mentioned, and leading and driving away the same, and impounding and keeping the same for the space of ——, part of the said time in the said first count mentioned [and until the plaintiff was forced and obliged to pay the said sum of £—— in the said first count mentioned, to have the same released and restored to the plaintiff, as in the said first count mentioned, (u)] the defendant says, that the defendant before and at the said time when &c. was lawfully possessed (x) of a certain close, with the appurtenances, called ——, (y) situate in the parish aforesaid, in the county aforesaid; (z) and because the said cattle in the said first count mentioned, before and at the said time when &c. (a) in the said first count mentioned, were wrongfully in the said close of the defendant, in which &c. eating and depasturing the grass and herbage of the defendant there then growing and doing damage there to the defendant, he the defendant, at the said time when &c. seized and took the said cattle in the said declaration mentioned, in the said close of the defendant, so doing damage therein as aforesaid, as a distress for the said damage, and led and drove away the same out of the same close, in which &c. to a certain common pound in the parish aforesaid, and there impounded the same, and kept the same impounded for the said space of time [in the introductory part of this plea, and] in the said declaration mentioned, and until

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(t) See forms, 9 Wentw. Index, lxxi. lxxii. lxxvi. lxxviii.; 3 Wils. 20; Morg. 638; Plead. A. 486; *Field* v. *Adams*, 12 A. & E. 649; 4 P. & D. 504, S. C.; *Carruthers* v. *Hollis*, 8 A. & E. 114; and the law, Com. Dig. Pleader, 3 M. 26. See a form of avowry in replevin as copyholder, and notes, *ante*, 308. See a plea, justifying an entry into premises to make a distress for *rent*, *post*, 353. In *replevin*, it is necessary in the plea to set forth the defendant's title, but in *trespass* it is sufficient to state that the defendant was "*lawfully possessed*," 1 Saund. 221, note 1; 1 East, 212. If the defendant justify as servant of another, state in the commencement of the plea, that one E. F. was possessed, &c. and in stating the distress, say, that "he the defendant, as the servant of the said E. F. and by his command, at the said time, when &c. seized &c." See 1 Saund. 221.

In an action for abusing a distress, by putting the animals distrained into a muddy pound, whereby they were injured, it is no defence that the place was the manor pound, and was *generally* in a proper state. The distrainor must at his peril put the distress into a pound, which is not only in general, but at the particular time, fit for it, and if the common pound be unfit (though by means of a casualty, as rain or snow), he must find another; and where to trespass for distraining sheep and injuring them by impounding them in a muddy pound, the defendants pleaded distress damage-feasant, and that the sheep were impounded in a common pound with no unnecessary damage to them; the plaintiffs replied that the defendants after the distress, at the time when &c. impounded them in the pound in the declaration mentioned, which was then too small, and which was then muddy, and thereby injured them, and the defendant rejoined that the pound was not too small nor muddy, in manner &c.: it was held that this was an issue on the state of the pound at the time of the impounding, and that on proof that the pound was *then* muddy, the plaintiff was entitled to recover; *Wilder* v. *Speer*, 8 A. & E. 547.

(u) This enumeration of the trespasses intended to be justified must depend on the statement in the declaration, and in many cases may be unnecessary.

(x) This is sufficient; 2 Salk. 643; 4 M. & S. 392; 16 East, 343.

(y) Or, "abutting, &c." setting out the abuttals, as *ante*, vol. ii. 662.

(z) This is necessary, 6 Mod. 117.

(a) This is a material and traversable allegation, and the defendant must, if it be traversed, prove that he was, at the time of the distress, possessed of the close where the cattle trespassed; *Bond* v. *Dornton*, 2 Adol. & El. 26.

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the plaintiff paid to the defendant the said sum of £—— in the said first count mentioned, to have the same released and restored to the plaintiff, as and for the same, then being a reasonable satisfaction for the said damage so done by the said cattle as aforesaid, (*b*) as it was lawful for the defendant to do for the cause aforesaid; which are the same alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above thereof complained against the defendant. And this the defendant is ready to verify, &c.

Plea justifying chasing of sheep with a little dog, they being damage feasant.

See the form in Latch, Rep. 119, 120.

Justification of the removal of goods to a small distance, because the same were encumbering defendant's close. (*c*)

And for a further plea in this behalf [as to the seizing, taking, removing and carrying away the said goods and chattels in the said declaration mentioned] (*d*) the defendant saith, that before and at the said time when &c. he the defendant was lawfully possessed of a certain close called ——, [*or if no name*, "situate at" &c.] and because the said goods and chattels in the said last count mentioned, before and at the said time when &c. were wrongfully in and upon the said close or piece or parcel of land, encumbering the same, and doing damage there to the defendant, he the defendant, at the said time when &c. seized and took the said goods and chattels in the said close, piece or parcel of land, so encumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use (*e*) of the plaintiff, doing no unnecessary damage to the said goods and chattels on the occasion aforesaid, and as he lawfully might for the cause aforesaid; which are the same alleged trespasses whereof the plaintiff hath above thereof complained against the defendant. And this the defendant is ready to verify, &c.

Removal of a Public Nuisance.

Plea to trespass for removing tunnels, &c. justifying on the ground that tunnels were withdrawing water from a public river. (*f*)

1. Removal of a Public Nuisance.

And for a further plea in this behalf, the defendant says, that a certain river called the river ——, running and flowing in the county aforesaid, for a long time before and at the time of the committing of the said alleged trespasses, was and still is a common and public navigable river and highway for all the liege subjects of our said lady the queen, with their barges

(*b*) These averments must depend on the statements in the declaration, and may be in some cases unnecessary.

(*c*) See notes to the last form; and see pleas in *Neville* v. *Cooper*, 2 Crom. & M. 329; *Drewell* v. *Fowler*, 3 Bar. & Adol. 735; and *Ackland* v. *Lulley*, 1 P. & D. 636. If A. wrongfully place goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building, for the purpose of removing and depositing the goods there for A.'s use; *Rea* v. *Sheward*, 2 M. & W. 424.

(*d*) If the declaration be only for the taking of the goods, this enumeration of the trespasses intended to be justified would be unnecessary.

(*e*) This is traversable, and when to traverse it, see 4 T. R. 364; and what removal is justifiable, and to where, see 1 Stark. 173.

(*f*) Any one may justify the removal of a common nuisance either by land or by water; Hale de Port. Mar. p. 2, c. 7. An entry to abate a nuisance which is dangerous to the public safety, and *which requires immediate abatement*, may be made *without any* demand; for necessity will justify an immediate entry. But where there is no such necessity, some application and notice must be made and given to the owner of the soil to *abate* the nuisance. See the law and authorities in 3 D. & R. 556; 2 B. & C. 302, S. C. As to the right to obstruct the encroachments of the sea, see 8 B. & C. 355.

Removal of a Public Nuisance.

and other vessels, to navigate, pass, repass and labour in and along the same, at their free will and pleasure; and the defendant further saith, that because the said tunnels in the said declaration mentioned, at the said time when &c. had been and then were wrongfully, unlawfully and unjustly kept and continued open between the said river and the said deeping fen, so that divers large quantities of the water of the said river through the said tunnels escaped from the said river, and thereby the water necessary for navigating the said river became and was greatly diminished and lowered, and thereby the liege subjects of our said lady the queen were hindered and prevented from navigating and using the said river so freely and advantageously as they otherwise might and would and ought to have done, (*g*) therefore he the defendant, being a liege subject of our said lady the queen at the said time when &c. in order to abate and remove the said nuisance, and to hinder and prevent the water in the said river, necessary to keep and continue the same navigable, from escaping from the said river through the said tunnels, did necessarily enter the said deeping fen, and did dig up, force up, pull up, stop up, and a little injure the said tunnels of the plaintiffs, so wrongfully, unlawfully and injuriously kept and continued open as aforesaid, and hindered and prevented the water in the said river from running and escaping from the same by and through the said tunnels, and in so doing necessarily broke to pieces and damaged divers parts of the said tunnels and committed the other alleged trespasses; and the materials thereof coming and arising, to wit, the said materials and goods and chattels in the said declaration mentioned, removed to a small and convenient distance, and then and there laid and left the same for the use of the plaintiffs, doing as little damage to the plaintiffs as he possibly could on the occasions aforesaid, and as he lawfully might for the cause aforesaid, and which are the said alleged trespasses in the said declaration mentioned. And this the defendant is ready to verify, &c.

2. Distress for Rent.

Distress for Rent.

Justifying trespasses under distress for rent. (*h*)

If all the trespasses in the declaration cannot be justified under a distress for rent, then confine the plea and justification accordingly.] Say, that the plaintiff, [*or*, "one E. F."] for a long time, to wit, for the space of one [*the time during which the rent distrained for was accruing due,*] year next before and ending on the 29th day of September, A. D. 1830, [*the day when the rent fell due*] and from thence until and at the said time when &c. held and enjoyed the said

(*g*) If this were a private nuisance, or not requiring *immediate* abatement, *semble*, the plea ought to aver a request to remove; *Lord Lonsdale* v. *Nelson*, 2 Bar. & C. 302; 3 D. & R. 556, S. C.; see *post*, 364, note (*l*).

(*h*) See forms in *Twigg* v. *Potts*, 1 Cr. M. & R. 89; *Hooker* v. *Nye*, 1 Cr. M. & R. 258; *Neale* v. *Mackenzie*, 2 Cr. M. & R. 84; *Ladd* v. *Thomas*, 4 P. & D. 9; 12 A. & E. 117, S. C. By the 11 Geo. 2, c. 19, s. 21, this defence, where the distress is on the demised premises, may be given in evidence under the general issue. But it may be frequently advisable to plead it specially, in order to narrow the issue and evidence at the trial. When the distress is off the demised premises, as in cases of fraudulent removal, &c. the defence must be pleaded specially; 1 Esp. 257; *Furneaux* v. *Fotherby*, 4 Campb. 136. In trespass for breaking the outer door, and entering the plaintiff's dwelling house, and seizing his goods, the defendant may give in evidence under the plea of "not guilty" by statute, that he had entered under a warrant of distress for rent, and was forcibly turned out of possession, and thereupon broke the door and entered in order to seize the goods; *Eagleton* v. *Gutteridge*, 11 M. & W. 465.

DISTRESS FOR RENT.

dwelling-house, [*as in the declaration*] in which &c. as tenant thereof to the defendant, C. D. under and by virtue of a certain demise thereof heretofore, to wit, on the —— day of ——, A. D. 18—, made by the defendant to the plaintiff for the term of —— years from thence next ensuing [*or* "for one whole year from thence next ensuing, and so on from year to year so long as the plaintiff and the defendant should think fit"], (*i*) at and under the yearly rent of £40, payable quarterly, that is to say, on &c. [*state the quarterly days, and describe the terms of the tenancy as to the payment of rent accurately,*] the —— by even and equal portions; the reversion thereof then belonging to the said C. D.; (*k*) and the defendants further say, that on the day and year last aforesaid a large sum of money, to wit, the sum of £40, of the rent aforesaid, for one year [*according to the fact*] of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable to the defendant, C. D. and at the said time when &c. was in arrear and unpaid; wherefore the defendant C. D. in his own right, and the defendant G. H. as the bailiff of the said C. D. and by his command, on the said first day when &c. did enter into and upon the said dwelling-house, in which &c. for the purpose and in order to seize, take and distrain, and did then seize, take and distrain the said goods and chattels in the said declaration mentioned, as and for a distress for the said rent so due and in arrear as aforesaid, and took and impounded the same thereon, as such distress as aforesaid, on the most fit and convenient part thereof for that purpose, according to the form of the statute in such case made and provided, and the same not being replevied, the said C. D. in his own right, and the said other defendants as the servants of the said C. D. and by his command, at the said time when &c. sold and disposed of the said goods and chattels for and towards the satisfaction and discharge of the said arrears of rent, and the costs, charges and expenses of the said distress, as they lawfully might for the cause aforesaid, which are the same alleged trespasses in the introductory part of this plea mentioned, [*or*, "in the said declaration mentioned."] And this the defendants are ready to verify, &c.

SEIZURE FOR PORT DUTIES.

3. SEIZURE FOR PORT DUTIES.

Justification of taking coals under a prescriptive right to port duties. (*l*)

And for a further plea in this behalf, [as to the seizing and taking the said coals in the said first count of the said declaration mentioned, and keeping and detaining the same from the plaintiff for a certain space of time, to wit, for the space of ——, part of the said time in the said first count mentioned, and also as to the seizing, taking and carrying away the said coals in the said last count mentioned, and converting and disposing

(*i*) It seems that the date of the demise and the term should be stated, but the omission cannot be taken advantage of on general demurrer; see judgments of Littledale, J. & Patteson, J. in *Bowler* v. *Nicholson*, 4 P. & D. 21, 22; 12 A. & E. 341, S. C.

(*k*) The plea need not show that defendant had any reversion, as the want of such reversion must be replied specially; *Hooker* v. *Nye*, 1 Cr. M. & R. 258; *Neale* v. *Mackenzie*, 2 Cr. M. & R. 84.

(*l*) See forms, 9 Wentw. Index, lxxiii. lxxxii.; 8 Wentw. 124; 3 Burr. 1402; Lutw. 1519; 2 Wils. 95; Lord Raymond, 384. Another plea was added, stating the prescription to be "*to take a reasonable distress;*" and another, that the port duty was payable by persons *not being legally exempted* from the payment.

thereof as therein mentioned,] the defendant says, that long before and at the same time when &c. one E. F. was and still is seised in his demesne as of fee of and in a certain ancient port, gout or haven, called ——— in the river ———, in the county of ———, and that he the said E. F. and all those whose estate he now hath, and at the said times when &c. had in the said port, gout or haven, for the time being, from time whereof the memory of man is not to the contrary, have repaired and maintained, and have been used and accustomed to repair and maintain, and of right ought to repair and maintain the said port, gout or haven, when and as often as it should be necessary, at his and their own proper costs and charges, for the use and benefit of all persons importing and exporting goods into or out of the said port, gout or haven, for the benefit and advantage of trade and navigation there. And that he the said E. F. and all those whose estate he now hath, and at the said time when &c. had, of and in the said port, gout or haven with the appurtenances, from time whereof the memory of man is not to the contrary, (*m*) have had, received and taken, and have been used and accustomed to have, and receive and take, and of right ought to have had and received and taken, and still of right ought to have, receive and take, of and from every ship or vessel arriving in the said port, gout or haven, with upwards of ten chaldrons of coals on board thereof, and unlading the same coals there, a certain reasonable toll or duty, that is to say, four bags of coals, containing respectively divers, to wit, two bushels, and when and as often as the said toll or duty hath been and remained unpaid, after reasonable request and demand thereof made, the owners and proprietors of the said port, gout or haven, for the time being, from time to time, from time whereof the memory of man is not to the contrary, have used and been accustomed to seize and take the said toll or duty, and to carry away the same, and to convert and dispose thereof to his and their own use. And the defendant further says, that before either of the said times when &c. a certain ship or vessel of the plaintiff, with a greater quantity than ten chaldrons of coal, to wit, twenty chaldrons of coal on board thereof, arrived in the said port, gout or haven, and did there before either of the said times when &c. unlade the said last mentioned quantity of coals, by reason whereof a certain toll or duty, to wit, —— bags of coals, containing respectively divers, to wit, two bushels, became and was due and payable from the plaintiff to the said E. F. Whereupon the defendant, just before the said time when &c., to wit, on the day and year in the said declaration mentioned, as the servant of the said E. F. and by his command, in the said port, gout or haven, demanded of and from the plaintiff the said toll or duty for the said coals, for and on account of the said E. F., whereupon the plaintiff then refused to pay or deliver the same, and thereupon the defendant, at the said times when &c., in the said port, gout or haven, as such servant of the said E. F. and by his command, seized, took and carried away the said —— bushels of coals in the said last count mentioned as and for such toll or duty so due and payable as aforesaid, the same being part of the said coals so brought into the said port, gout or haven as aforesaid, and kept and detained the same for the said space of time in the said first count mentioned, and in so doing and in separating and dividing and measuring the

SEIZURE FOR PORT DUTIES.

E. F. seised of a port.

His obligation to repair.

Prescriptive right to port duties. (*m*)

And to seize for the same.

Plaintiff indebted in tolls.

Seizure by defendant as servant of E. F.

(*m*) As to pleading *prescriptive* right and forms, see *post*, 372, &c.

SEIZURE FOR PORT DUTIES.

same from the said coals so brought into the said port, gout or haven as aforesaid, did necessarily and unavoidably seize and take and keep and detain the residue of the said coals, [whereof the said coals in the said first count mentioned were part and parcel] for the said space of time in the introductory part of this plea mentioned, [*or* " in the said declaration mentioned,"] the same being a reasonable time for that purpose, doing no unnecessary damage to the plaintiff on the occasion aforesaid, as it was lawful for him to do for the cause aforesaid; which are the same alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above thereof complained against him; [without this, that he the defendant is guilty of the said seizing, taking and keeping and detaining the said coals in the said first count mentioned, or of seizing, taking or carrying away the said coals in the said last count mentioned, at &c. aforesaid, or elsewhere out of the said port, gout or haven, in the river —— aforesaid.] And this the defendant is ready to verify, &c. (*m*)

Justification by commissioners of a Court of Requests and their officer, of taking plaintiff's goods, that plaintiff had committed *contempt of Court*, whereupon defendants, who were commissioners, imposed a fine upon him, and issued their warrant to the other defendant, the officer, to levy it, by virtue of which he seized, &c.

See *Aldridge* v. *Haines*, 2 Bar. & Adol. 395.

To trespass for seizing weights and measures, that defendants, together with others, were sworn as a leet jury to examine weights and measures within a manor, and that on that jury the plaintiff's weights &c. were found defective, wherefore &c. (*n*)

See *Sheppard* v. *Hall and others*, 3 B. & Adol. 433; *Wilcock* v. *Windler*, *id.* 43.

To trespass for seizing a ship, plea that the defendant was in the service of a foreign friendly king, and was ordered to blockade the coast, and because the plaintiff broke the blockade the defendant took the ship. (*o*)

See plea, *Dobree* v. *Napier*, 2 Bing. N. C. 781.

JUSTIFYING KILLING DOGS, &c.

4. JUSTIFYING KILLING DOGS, &c.

Plea to a declaration for shooting a dog, that the dog was accustomed to bite sheep and worry them, and it was worrying the sheep of one E. F. in his closes, and because the dog *could not otherwise be prevented from worrying said sheep*, defendant, as servant of said E. F. shot said dog. (*p*)

And for a further plea in this behalf, [as to the shooting-off, firing-off and discharging the said gun, in the said first count of the said declaration mentioned, at, towards and against the said dog, in that count also mentioned, and killing, striking and wounding the said dog, above alleged to have been

(*m*) If a special traverse be introduced, the plea should conclude to the country, but as no venue is now introduced in the body of a declaration for seizing *goods*, the special traverse will seldom, if ever, be proper in a plea to such a declaration.

(*n*) A custom in a manor for the leet jury to break and destroy measures found by them to be false is lawful; *Sheppard* v. *Hall*, 3 B. & Adol. 433. In a plea of justification grounded on such custom, it is enough to say that the measures were found by the jury to be false, without alleging that they were so; *id. ibid.*

(*o*) Notwithstanding the provisions of the Foreign Enlistment Act, 59 Geo. 3, c. 69, a British subject who, in the service of a foreign state at peace with Great Britain, captures a British vessel which is lawfully condemned as prize for breaking blockade, is not liable to an action at the suit of the owner of the vessel; *Dobree* v. *Napier*, 2 Bing. N. C. 781.

(*p*) See 1 Saund. 84, and 2 Latw. 1494. See plea justifying killing dog in a warren, because it was pursuing the conies there, Cro. Jac. 44; killing dog for pursuing deer in a park, 2 Rich. Prac. C. P. 435, 5th edit. See 11 East, 568, as to the right to set dog-spears; 7 Taunt. 489; 2 Marsh. 577; 1 Moore, 203, S. C.; *Jordin* v. *Crump*, 8 M. & W. 782. In a plea justifying killing a dog, because it attacked defendant and was accustomed to bite mankind, these allegations are material and must be proved; 1 Car. N. P. Rep. 106.

done by the defendant,(q) the defendant saith, that the said dog in the said first count of the said declaration mentioned [before the said time when &c. in that count mentioned, had been and was used and accustomed to hurt and worry sheep. And the defendant further saith, that the said dog being so used and accustomed to hurt and worry sheep,] just before the said time when &c., to wit, on the day and year in the said first count mentioned, was hunting and worrying certain sheep of one E. F. of great value, [in a certain close of him the said E. F. there situate,] for which reason, and because the said dog could not otherwise be restrained or hindered from hunting and worrying the said sheep, he the defendant at the said time when &c., as the servant of the said E. F. and by his command, shot off, fired off and discharged the said gun, in the said first count of the said declaration mentioned, at, towards and against the said dog, and then shot, hit, struck and wounded the said dog, as it was lawful for him to do for the cause aforesaid, which is the said alleged trespass [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

Justifying killing Dogs, &c.

5. Plaintiff's Negligence.

Plaintiff's Negligence.

Pleas to trespass, for running defendant's gig against plaintiff's mare, that defendant was driving the gig along the highway, leaving sufficient room, and that the mare was so badly managed, and so unruly, that thereby the accident happened.(r)

And for a further plea in this behalf, the defendant says, that just before and at the said time when &c. the defendant was driving the said gig and horse in the said first count mentioned, in and along the queen's highway, leaving ample and sufficient room for the said mare of the plaintiff, then also at the same time when &c. being and going in and along the said highway, to pass by the said gig and horse of the defendant, nevertheless the defendant in fact saith, that the said mare of the plaintiff at the said time when &c. was so negligently, carelessly and improperly managed, and was so unruly, that by and through such negligence, carelessness, improper management, and such unruliness of the said mare as aforesaid, the said mare, at the said time when &c. in the said first count mentioned, attempting to pass the said gig of the defendant, ran upon and struck against the said gig of the defendant, and the said gig of the defendant was thereby also driven by the defendant against the said mare, without any default on the part of the defendant; and so the defendant in fact saith, that whatever hurt or damage then happened to the said mare, the same was caused by the said negligent, careless and improper management of the said mare, and by the unruliness of the said mare, and not by the default of the defendant, which are the said alleged trespasses in the said [first count of the said] declaration mentioned, and whereof the plaintiff hath above thereof complained against him. And this the defendant is ready to verify, &c.

Plea, that plaintiff's mare was so improperly managed in the highway that by reason thereof the accident happened.

And for a further plea in this behalf, the defendant says, that before and at the said time when &c. in the said [first] count mentioned, the defendant

(q) This enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

(r) That this defence must be pleaded specially, see 2 Campb. 500; otherwise in case, *Gough* v. *Bryan*, 2 M. & W. 770; *Bridge* v. *Grand Junction Railway Company*, 3 M. & W. 244. See similar plea in *M'Laughlin* v. *Pryor*, 4 M. & G. 48, and observations by Cresswell, J. thereon, *id. ibid.* 61.

PLAINTIFF'S NEGLIGENCE.

was driving his said gig and horse in the [first] count mentioned, in and along the said queen's highway, the said mare of the plaintiff then also at the said time when &c. being and going in and along the said highway, nevertheless the defendant in fact saith, that the said mare of the plaintiff at the said time when &c. was so carelessly, negligently and improperly managed in the said highway, near to the said gig, that by reason thereof the said gig of the defendant by accident, (*s*) and without any default on the part of the defendant, but by and through the want of due care in the management of the said mare, then was driven upon and against the said mare, and thereby the said mare sustained the said injury in the said [first] count mentioned; and so the defendant in fact saith, *that whatever hurt or damage then happened to the said mare, the same was caused by such accident*, and not by the default of him the defendant, which are the said supposed trespasses &c. [*Conclude as in the former plea.*

IV. TO REAL PROPERTY.

TO REAL PROPERTY.

Not guilty.

As *ante*, 312.

Plea in trespass to a *house* or *land*, denying plaintiff's possession. (*t*)

And for a further plea in this behalf, the defendant saith, that the said close in which &c. was not at the said several times when &c., or either of them, the close of the plaintiff in manner and form as the plaintiff hath above alleged. And of this the defendant puts himself upon the country, &c. (*u*)

Plea, denial of plaintiff's possession of the close, or grass, or herbage.

And the defendants, by ——, their attorney, as to all the said alleged trespasses in the said declaration mentioned, except as to the said alleged trespasses as to the said gates, locks, staples, hinges, walls and fences, and the materials thereof, say, that the said close, grass and herbage were not, nor was any or either of them or any part thereof at the said times when &c.

(*s*) See the case in 4 Mod. 404, cited in 3 Wils. 411, 412.

(*t*) A plea denying the close, &c. to be the plaintiff's is a denial of possession, if the defendant was a wrong-doer; if otherwise, of the right to the possession; but on either supposition it is a denial of *title*, as even possession is title against a wrong-doer, and therefore such a plea raises a question of title in the action; *Purnell* v. *Young*, 3 M. & W. 288; see *Brown* v. *Dawson*, 4 P. & D. 355; *Fyson* v. *Chambers*, 9 M. & W. 463; but see the case of *Whittington* v. *Boxall*, referred to in *Harrison* v. *Dixon*, 1 D. & L. 457, *contrd.* Evidence of possession is sufficient to entitle the plaintiff to a verdict on this plea; *Heath* v. *Milward*, 2 Bing. N. C. 98. In *Morse* v. *Apperley*, 6 M. & W. 145; 8 Dowl. 203, S. C., the defendant was allowed to plead with this plea pleas that the defendant was seised in fee, and also a plea that a third party was so seised, and justifying by his command. Where in trespass for breaking, &c. a wall of the plaintiff, bounded on the north by a workshop of the defendant, the defendant pleaded that the wall was not the wall of the plaintiff, and it appeared that the wall was a party wall, standing partly on the plaintiff's and partly on defendant's land; that the roof of defendant's workshop rested on the top of the wall on defendant's side; and that the trespass was committed partly on the plaintiff's half of the wall: it was held, that the defendant was entitled to the verdict, for that the plaintiff must be understood to have brought his action for the whole wall; and even if the party wall were treated as two walls, the defendant's part could not be considered as part of the workshop, and therefore the description in the declaration, with the abuttals, comprehended the whole wall, and consequently the plaintiff had not proved his property in the wall described in the declaration; *Murly* v. *M'Dermott*, 8 A. & E. 138; 3 N. & P. 356, S. C.

(*u*) This plea properly concludes to the country; *Fleming* v. *Cooper*, 5 A. & E. 221.

or at any or either of them, the close, grass or herbage of the plaintiff, in manner and form as the plaintiff hath above alleged. And of this the defendants put themselves upon the country, &c.

To breaking gates, hinges, &c. not guilty

And as to the forcing, breaking open, breaking to pieces, damaging and spoiling the said gates and the said locks, staples and hinges, the defendants say, that they are not guilty of the trespasses in respect of the same, or any of them, or any part thereof, in manner and form as the plaintiff hath above thereof complained against them. And of this they put themselves upon the country, &c.

See form of plea, *Jones* v. *Brown*, 1 Hodges, 33.

Justification by assignees of a bankrupt, stating proceedings.

1. Liberum Tenementum.

Liberum Tenementum.

Plea of *liberum tenementum* by one defendant in his own right, and by the other as his servant. (*x*)

Enumeration of the trespasses. (*y*)

Locus in quo freehold of defendant E. F.

And for a further plea in this behalf, [as to the breaking and entering the said close, in which &c. in the said declaration mentioned, and with feet in walking treading down, trampling upon, consuming and spoiling the grass and herbage there then growing, and tearing up, forcing up, and removing the faggots in that count mentioned, and scraping up and collecting together the loose earth, soil, manure and compost in the said first count mentioned, and beating down, throwing down, prostrating and destroying part of the banks and mounds in that count also mentioned, and casting and throwing the said loose earth, soil, manure and compost so scraped up and collected, and the earth and soil arising from the said banks and mounds so prostrated and destroyed as aforesaid, from and out of the said close; (*y*)] the defendants say, that the said close in the said declaration mentioned, and in which &c.

(*x*) This plea in trespass gives implied colour, for it admits a possession sufficient as against a wrong-doer, *Doe* v. *Wright*, 2 P. & D. 672; and that the defendant is himself *primâ facie* a wrong-doer; but he undertakes to show a title in himself, which shall do away with the presumption arising from the plaintiff's possession; *Brest* v. *Lever*, 7 M. & W. 595. As to the plea of *liberum tenementum* in general, see *ante*, vol. i. Index, "*Liberum Tenementum*;" and 1 Saund. 299 b, n. 6; Com. Dig. Pleader, 3 M. 34; Willes, 218; and see a form Petersdorff's Pre. 266. A right of possession as a freeholder or leaseholder, &c. might formerly be given in evidence under the general issue, not guilty, see 8 T. R. 403; and in that case the defendant was, under the general issue, permitted to give in evidence the pulling down a wall. But in 8 East, 394, 400, the Court held that the defendant could not justify, under the general issue, the cutting the posts and rails of another, though put upon the defendant's own soil; it is therefore frequently necessary to plead *liberum tenementum*, and to justify the cutting or removal of rails, &c. specially, as encumbering the defendant's land. This plea may also be advisable, in order to compel the plaintiff to new assign, where he has not set forth the abuttals or name of the close in his declaration; 11 East, 51, 65; 1 B. & C. 489; 2 D. & R. 719; S. C.; 1 Saund. 299 b, c.; or to narrow the evidence as to the title of the parties; but unless some real advantage is to be gained by it, where there is a second count for removing or carrying away goods only, it may be advisable in a distinct plea to state, "that the defendant was lawfully possessed of a certain close, and that he took the goods encumbering the same, and moved them to a convenient distance, and there left them for the use of the plaintiff," as in the precedent, *ante*, 352; see 6 Mod. 117; Willes, 222, n. (*b*). The plea of *liberum tenementum* admits the plaintiff's possession and renders it incumbent on the defendant to prove title, either by deed or by showing twenty years' actual possession; *Grice* v. *Lever*, 9 Dowl. 246. See a plea justifying on ground that the *locus in quo* had been separated from the waste for twenty years, 2 Taunt. 156.

(*y*) The enumeration of these trespasses, intended to be justified, must depend on the statements in the declaration, and in many cases may be wholly unnecessary. See the note to the commencement of the next form of plea.

LIBERUM TENEMENTUM.

now is, and at the said several times when &c. was the close, soil and freehold of the defendant E. F.; wherefore the defendant [E. F. in his own right, and the said C. D. as the servant of the said E. F. *and by his command* (z)] at the said times when &c. in the said declaration mentioned, [broke and entered the said close, in which &c. and with feet† in walking trod down, trampled upon, consumed and spoiled the said grass and herbage therein also mentioned, (a)] and because the said [faggots, earth, soil, manure and compost in the said declaration mentioned, and the said part of the said banks and mounds in the said declaration (a) mentioned,] before the said times when &c. had been wrongfully and injuriously put and placed, and were at those times remaining and being in and upon the said close, in which &c. and encumbering the same, he the said E. F. in his own right, and the said C. D. as his servant and bailiff in that behalf, and by such command as aforesaid, in order to remove the said encumbrances, [tore up, forced up, and removed the said faggots, and scraped up and collected together the said loose earth, soil, manure and compost, and beat down, threw down, prostrated and destroyed the said part of the said banks and mounds in the said declaration mentioned, and cast and threw the said loose earth, soil, manure and compost, so scraped up and collected, and the said earth and soil arising from the said banks and mounds so prostrated and destroyed, as in the same count mentioned, (a)] from and out of the said close, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which are the same alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above complained against the defendants. And this the defendants are ready to verify, &c.

Defendant's entry, &c. as his servant.

The like in a more concise form. (b)

And for a further plea in this behalf, the defendants say, [*if the trespasses in the declaration relate entirely to land or realty, and not to any personal property, there is no occasion for any recital, but otherwise it is necessary to qualify the plea in its commencement, by reciting the trespasses to the land as in the last form,*] because they say, that the said close in the said declaration mentioned, and in which &c. now is, and at the said several times when &c. was the close, soil and freehold of the said C. D.; wherefore the said C. D. in his own right, and the said E. F. as his servant, and by his command, at the said several times when &c. committed the said several alleged trespasses in the said declaration mentioned, [*or* "in the introductory part of this plea mentioned,"] in the said close, in which &c. so being the close, soil and freehold of the said C. D. as they lawfully might for the cause aforesaid, which are the said several alleged trespasses whereof the plaintiff hath above thereof complained against them. And this the defendants are ready to verify, &c.

(z) These words are necessary if the defendants, or one of them, justify as the servant of the freeholder, see *ante*, vol. i. Index, "*Trespass.*" The command is traversable in trespass, 11 East, 65.

(a) This averment between brackets must depend on the averments in the declaration. See the next form.

(b) See the notes to the above form.

2. SEISIN OF A COPYHOLDER.

SEISIN OF A COPYHOLDER.

Seisin in fee by copyholder. (*c*)

Limit the plea to the trespasses intended to be justified, as ante, 359, *and then proceed as follows:*] Says, that the said close, in which &c. in the said declaration mentioned, now is, and at the said several times when &c. in the said declaration mentioned was, *and from time immemorial hath been,* within and parcel of the manor of ——, in the county of ——, and a customary tenement of that manor, demised and demisable by copy of the court rolls of the said manor, by the lord of the said manor, or by his steward of the Court of the said manor for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord of the said manor, according to the custom of the said manor. And the defendant further says, that long before either of the said times when &c. in the said declaration mentioned, to wit, on the —— day of ——, A. D. ——, E. F., Esq., then being lord of the said manor, at his Court Baron then holden in and for the said manor, before G. H. ——, then being his steward of the Court of the said manor, by copy of the court rolls of the said manor, granted to the defendant, amongst other things, the said close, in which &c. to hold the same to the defendant, his heirs and assigns for ever, by copy of the court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor; by virtue of which said grant the defendant afterwards, and before any of the said times when &c., to wit, on the day and year last aforesaid, entered into the said close, in which &c. and became and was seised thereof in his demesne as of fee, at the will of the lord of the said manor, according to the custom of the said manor, and continued so seised thereof until and at and after the said several times when &c.; wherefore the defendant at the said times when &c. in the said declaration mentioned, broke and entered the said close, in which &c. and with his feet &c. [*Conclude as in the form, ante,* 360, *from the* †.]

Another form by a copyholder in fee and his servant, giving express colour to the plaintiff. (*d*)

And for a further plea in this behalf, the defendants say, that the said dwelling-house &c. in which &c. were, and at the time of the committing of the alleged trespasses &c. were, and from time immemorial had been, within and parcel of the manor of P. in the county of S., and a customary tenement of that manor, demised and demisable by copy of the court rolls of the said manor by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same in fee simple or otherwise, at the will of the lord of the said manor, according to the custom of the said manor. And the defendants further say, that before the time when &c., to wit, on the —— day of ——, 18—, Sir R. H. Bart., then being the lord of the said manor, at his Court Baron

(*c*) As to the mode of pleading a copyhold title in general, see *ante,* vol. ii. Index, "*Copyhold Estate.*" As to the replication, 11 East, 70, n. a. If by the lessee of a copyholder, the plea, after stating the seisin of the copyholder as in this form, may state the demise as in the forms, *post,* 362; and a license by the lord to demise need not be stated, Bac. Ab. Leases, I. 6; see a defective plea by mortgagee of plaintiff, a copyholder, *Watson* v. *Walham,* 1 Harr. 24; surrenderee of copyhold must aver his admittance, 1 Chitty's Gen. Pr. 348; 1 T. R. 600. See form of plea by defendants as servants of a copyholder, *Brown* v. *Storey,* 1 M. & G. 117.

(*d*) Where the plaintiff replies an estoppel to this plea, the allegation in the plea that C. was owner, and B. acted as his servant, though not denied by the replication, is not admitted; *Darlington* v. *Pritchard,* 4 M. & G. 783.

SEISIN OF A COPYHOLDER.

then holden in and for the said manor, before &c., then being his steward of the court of his said manor, by copy of the court rolls of the said manor, granted to the defendant F. P. the said dwelling-house &c. in which &c. to hold to the defendant F. P. his heirs &c. for ever, by copy of the court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor; by virtue of which grant, the defendant F. P. afterwards, and at the time of the committing of the first of the said alleged trespasses, to wit, on the said —— day of ——, 18—, entered into the said dwelling-house &c. and became and was seised thereof in his demesne as of fee, at the will of the lord of the said manor, according to the custom of the said manor. And the defendants further say, that before the time of the said entry so made by the defendant F. B. as aforesaid, the plaintiff, claiming title to the said dwelling-house &c., under colour of a certain charter of demise pretended to be thereof made to him, before the committing of the said alleged trespasses, by one J. P. for the term of his natural life, whereas nothing of or in the said dwelling-house &c. or any part thereof, ever passed by virtue of that charter, entered the said dwelling-house &c., and was in possession thereof at the time of the said entry by the defendant F. P. as aforesaid; and thereupon the defendant F. P. in his own right, and the other defendant M. P. as his servant and by his command, at the several times when &c. broke and entered the said dwelling-house &c., and committed the alleged trespasses therein and thereto as in the said declaration mentioned; and because the said household furniture &c. of the plaintiff in the declaration mentioned, before and at the said times when &c., were wrongfully in and upon the said dwelling-house &c. incumbering the same, and doing damage to the defendant F. P., he the said last-mentioned defendant in his own right, and the said other defendant M. P. as his servant and by his command, seized the said household furniture &c. in the said dwelling-house &c. so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, and there left the same for the use of the plaintiff, whereof the plaintiff then had notice, doing no unnecessary damage to the said household furniture &c. on the occasion aforesaid, and then quietly ejected and expelled the plaintiff and his family from the possession of the said dwelling-house &c., and kept and continued them so ejected and expelled from thence hitherto, as they lawfully might for the cause aforesaid; which are the same alleged trespasses &c. And this the defendants are ready to verify, &c.

POSSESSION OF LESSEE.

3. POSSESSION OF LESSEE.

Justification by tenant under a lease for years giving *express colour* to plaintiff. (*e*)

State the trespasses intended to be justified according to the declaration, if indeed there be any occasion to enumerate them, and proceed as follows:] Saith,

(*e*) As to this plea, see Com. Dig. Plead. 3 M. 40, 41, and *ante*, vol. i. Index, "*Colour*;" see form, *Bees* v. *Williams*, 2 Crom. M. & Ros. 582; *Holmes* v. *Newlands*, 11 A. & E. 44; 3 P. & D. 128, S. C. Though the right of possession might have been given in evidence under the general issue, 8 T. R. 403, it was frequently advisable to plead this plea in order to compel the plaintiff to set forth his own title, or to admit some part of the defendant's; and where the plaintiff, in trespass *quare clausum fregit*, states also the removal of personal property, or cutting down posts and rails &c., this plea is necessary; 8 East, 404. See several pleas of this nature allowed to be pleaded to the same cause of action, *Pim* v. *Grazebrook*, 3 M. & G. 863.

that one E. E. before any of the said times when &c. to wit, on &c. was seised in his demesne as of fee of and in the said close in the said declaration mentioned, and in which &c. with the appurtenances; and being so thereof seised, afterwards, and before any of the said times when &c. in the said declaration mentioned, to wit, on the day and year last aforesaid, by a certain indenture then made between the said E. F. of the one part and the defendant of the other part, which said &c. [*here state the profert of the lease, and the demise and reference to the indenture, and the defendant's entry, as ante*, vol. ii. 391, *and then proceed as follows:*] And the defendant being so possessed, the plaintiff, claiming title to the said close in which &c. with the appurtenances, under colour of a certain "charter" (*g*) of demise, pretended to be thereof made to him by the said E. F. for the term of his natural life, before the making of the said demise by the said E. F. to the defendant as aforesaid, whereas nothing of or in the said close in which &c., or any part thereof, ever passed by virtue of that charter, afterwards and before any of the said times when &c., and during the continuance of the said term so demised to the defendant as aforesaid, to wit, on the said first day in the said declaration mentioned, entered into and upon the said close in which &c. with the appurtenances, and was thereof possessed, and thereupon the defendent at the said several times when &c. entered into and upon the said close in the said declaration mentioned, and in which &c. in and upon the plaintiff's possession thereof, as being the close of the defendant, and with his feet &c. [*Same as the form, ante*, 360, *from the* † *to the end, if the declaration require that form of pleading, and justifying the trespasses according to the fact.*

Possession of Lessee.

Colour given. (*f*)

Same as the last form, except in the statement of the demise, which is to be as follows:] And being so seised thereof, he the said E. F. afterwards, and before either of the said times when &c., to wit, on &c. last aforesaid, demised the said close in which &c. with the appurtenances, to the defendant, to have and to hold the same to the defendant from thenceforth for one year then next following and fully to be complete and ended, and so from year to year for so long a time as the said E. F. and the defendant should respectively please. (*i*) By virtue &c. [*As in the last form to the end, adopting the words* "tenancy" *instead of* "term."

The like by a tenant from year to year. (*h*)

See plea, *Smith* v. *Adkins*, 8 M. & W. 362; 1 Dowl. N. S. 129, S. C.; also *Foulkes* v. *Scarfe*, 4 M. & G. 126.

In trespass for breaking and entering plaintiff's house, expelling the plaintiff, and taking his goods, plea that the house was demised to overseers of the poor for the use of the poor, and that M. S. a pauper, refused to give up possession; that defendant had the execution of a warrant to get possession, and the plaintiff was in the occupation of the house, giving express colour to the plaintiff from M. S.

(*f*) See a deed of feoffment pleaded by way of colour, 2 Rich. C. P. 443; a deed of *gift of goods* pleaded by way of *colour*, *Jones* v. *Brown*, 1 Bing. N. C. 484.

(*g*) A necessary word; 2 Roll. Rep. 140.

(*h*) The tenancy, as to commencement and duration, must be stated according to the fact.

(*i*) See 4 East, 32. When the letting was from year to year this seems improper; because at the end of the *first* year either party might determine the tenancy, which, according to this form, he could not do.

Removal of Private Nuisance.

4. Removal of Private Nuisance.

Plea to trespass for lopping &c. trees, that they overshadowed and damaged defendant's grounds. (*k*)

After enumerating trespasses, if necessary, proceed as follows :] Because he says, that the defendant, before and at the said time when &c. and from thence hitherto hath been and still is lawfully possessed of and in a certain garden or parcel of land, situate and being in the county aforesaid, and that the said branches in the said first count mentioned, and the said wood and underwood in the said last count mentioned, just before the said time when &c. were overhanging, encumbering, and damaging the said garden or parcel of land of the defendant, and the vegetables therein growing, of which the plaintiff heretofore, and before the committing of the alleged trespasses, to wit, on &c. had notice, and was then requested by the defendant to cut &c. the said branches, &c., but the plaintiff wholly neglected and refused so to do ; (*l*) wherefore the defendant, at the said time when &c. did cut, lop and top the said branches and underwood so overhanging, encumbering and damaging the said close of the plaintiff as aforesaid, and took and carried away the said branches, wood, underwood, and berries to a small and convenient distance, and there left the same for the plaintiff as he lawfully might for the cause aforesaid, which are the said alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath complained against the defendant. And this the defendant is ready to verify, &c.

Plea, justifying pulling down a wall, because it obstructed and darkened an ancient light. (*m*)

And for a further plea in this behalf, the defendant says, that one A. B. at the said several times when &c. and long before, was and yet is lawfully possessed of an ancient messuage with the appurtenances, in the said parish and county, contiguous and adjoining to the said close, in which, &c. And because the plaintiff, at the several times when &c. injuriously and wrongfully erected and placed the said wall in the said close in which &c. to obstruct and darken, and did thereby obstruct and darken, an ancient window of the said A. B. by which light was conveyed into the said messuage of the said A. B. to the great damage and annoyance of the said A. B., he the defendant, at the said several times when &c., as the servant of the said A. B. and by his command, entered into the said close, in which &c. to *remove the said nuisance*, (*n*) and did walk in and over the said close, and did a little tread down, trample upon and damage the grass and soil there, and prostrate and destroy such part of the said wall so erected and placed there as was

(*k*) As to the right to abate a private nuisance, see 3 Bla. Com. 5. And as to the right to cut trees overshadowing defendant's land, see Roll. Rep. 394 ; 3 Bulstr. 198; Vin. Ab. Trees, E. and Nuisance, W. 2 pl. 3 ; 2 B. & C. 311 ; 3 D. & R. 556, S. C. See plea to trespass for breaking and entering a building and close of the plaintiff's, and removing goods from the building and depositing them upon the close; that the building was the building of the defendant, and the goods were encumbering it, and the defendant therefore removed them into the close; *Rea* v. *Sheward*, 2 M. & W. 424.

(*l*) A person has no right to enter upon the land of another in order to abate a nuisance, without previous notice or request to the owner of the land to remove it, unless it appears that the latter was the original wrong-doer by placing it there, or that it arises from a default in the performance of some duty cast upon him by law, or that the nuisance is immediately dangerous to life or health; *Jones* v. *Williams*, 11 M. & W. 176.

(*m*) As to the right to abate a private nuisance, see notes *supra* ; see also the notes to a declaration for obstructing ancient lights, *ante*, vol. ii.

(*n*) When a notice and request to plaintiff to remove should be shown, see 2 B. & C. 302; 3 D. & R. 556 ; *Jones* v. *Williams*, 11 M. & W. 176.

Removal of Private Nuisance.

necessary to be prostrated and destroyed for the purpose of abating the said nuisance, as it was lawful for him to do for the cause aforesaid, and thereupon then abated and removed the said nuisance, and in so doing the defendant did necessarily and unavoidably take down and carry away the materials of the said part of the said wall, and did remove the same to another part of the said close, and leave the same there for the use of the plaintiff, and in so doing as aforesaid did necessarily and unavoidably a little tread down, trample upon and damage the said grass and soil there, doing as little damage &c. to the plaintiff on the occasion aforesaid as he possibly could, which are the said several alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

5. Defect of Fences.

Defect of Fences.

Plea to trespass with cattle, that defendant was possessed of adjoining close, and that plaintiff ought to have repaired the fence between, and that the fence being out of repair, his cattle escaped into *locus in quo*, and defendant entered to drive them out. (*o*)

Close mentioned in both counts the same. (*p*)

Defendant possessed of a close adjoining *locus in quo*. (*r*)

Liability of plaintiff to repair fences of *locus in quo*. (*t*)

And for a further plea in this behalf, [as to the breaking and entering the said close in the said declaration mentioned, and in which &c. and with feet in walking treading down, trampling upon and spoiling the grass in the said close, and with the said cattle in the said declaration mentioned eating up, treading down, depasturing, consuming and spoiling other the grass growing in the said close, and with the said cattle tearing up, eating off, pulling up, plucking off, consuming, spoiling, biting off, topping and destroying the spring wood and underwood growing and being in the said close, and breaking down, throwing down and destoying the said hedge and fence in the said declaration mentioned, growing, standing and being round and upon the said close, above supposed to have been committed by the defendant, (*q*)] the defendant says, that the defendant before and at the said several times when &c. was lawfully possessed of a certain close called ——, (*s*) with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, and contiguous and next adjoining to the said close of the plaintiff in which &c.; and that the plaintiff and all other tenants and occupiers of the said close, in which &c. for the time being, *from time whereof the memory of man is not to the contrary*, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the plaintiff before and at the said several times when &c. of right ought to have repaired and amended, and still of right ought to repair and amend the hedge and fence between the said close of the defendant and the said close in which &c. when and as often as occasion hath required, and

(*o*) See the forms referred to in Com. Dig. Pleader, 3 M. 29; Thomp. Ent. 304; Wentw. 58; Winch. 996, or 1110, ed. 1680; Lutw. 1357; and 2 Saund. 284. As to the law, see 1 Taunt. 529; Com. Dig. Pleader, 3 M. 29; Vin. Abr. "*Fences*;" 2 Saund. 285, note 4; 2 B. & C. 311, 312.

(*p*) As to the allegation that the trespasses are one and the same, see *ante*, vol. i. Index, "*Pleas in Trespass*;" Plead. A. 430, &c.; 1 Marsh. Rep. 18.

(*q*) The enumeration of these trespasses intended to be justified must depend on the statements in the declaration, and in some cases may be wholly unnecessary.

(*r*) It is sufficient in trespass to say that the defendant was *possessed*, but not so in a plea in bar in replevin; 1 Saund. 346, n. 2; 2 Saund. 284, n. 3; Com. Dig. Pleader, 3 M. 29.

(*s*) Or if it has no name, set out the abuttals, as *ante*, vol. ii. 662.

(*t*) In the forms in 2 Saund. 284; Lutw. 1357, a prescriptive obligation to repair is laid in a *que estate* in the plaintiff, and according to Yelv. 74, 76; Com. Dig. Pleader,

DEFECT OF FENCES.

shall or may require, to prevent cattle *lawfully* (*u*) feeding and depasturing or being in the said close of the defendant from erring or escaping thereout, through the defects and insufficiency of the said hedge and fence into the said close in which &c. and doing damage there. And the defendant further saith, that the said hedge and fence before and at the said several times when &c. were ruinous, prostrate, fallen down and in great decay for want of needful and necessary making, repairing and amending thereof. By means whereof the said cattle in the said declaration mentioned, at the said several times when &c. then *lawfully* (*u*) feeding and depasturing in the said close of the defendant, without the knowledge of the defendant, and against his will, erred and escaped thereout into the said close in which &c. through the defect and insufficiency of the said hedge and fence, and eat up, (*x*) trod down, depastured, consumed and spoiled a little of the grass there growing, [and eat up, trod down, depastured, tore up, eat off, pulled up, plucked off, consumed, spoiled, bit off, topped and destroyed a little of the spring wood and underwood there also growing,] and in passing through the said hedge and fence, the said cattle, at the said time when &c. in the said declaration mentioned, necessarily and unavoidably a little broke down, threw down and destroyed the same, being the said hedge and fence in the said declaration mentioned. And on the occasions aforesaid, the defendant at the said several times when &c. as soon as he had notice (*y*) of the said cattle having escaped into and being in the said close in which &c. as aforesaid, entered into the said close in which &c. to drive, and did then drive, (*z*) the said cattle from and out of the said close in which &c. into the said close of the defendant, and in so doing, he the defendant, at the said several times when &c. did necessarily and unavoidably with his feet in walking (*a*) tread down, trample upon and spoil a little of the grass there also growing, doing no unnecessary damage to the plaintiff on the occasions aforesaid, and as he lawfully might for the cause aforesaid; which are the said several alleged trespasses whereof the plaintiff hath above complained against him the defendant. And this the defendant is ready to verify, &c.

Fence out of repair.

Whereby the cattle escaped.

Defendant's entry to turn out the cattle.

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3 M. 29; Vin. Abr. Fences, E.; Dyer, 365 a, 31; 1 T. R. 766; Cro. Jac. 665, this was formerly considered necessary; but there are several precedents where the obligation is merely stated to be on the occupier for the time being, Thomp. Ent. 304; 9 Went. 58; and see Com. Dig. Pleader, 3 M. 29; and 3 T. R. 768; and according to the last case, as the plaintiff is presumed to be ignorant of the nature of the defendant's obligation, it is clearly sufficient in a *declaration* to state that the defendant, as occupier, was bound to repair, without stating an immemorial liability; and the principle of that rule appears equally to apply to a *plea*, and if so it would suffice to lay the obligation to repair even more generally than in the above form, see *ante*, 592, n.

(*u*) This allegation is not usually inserted in the precedent, but see 2 Saund. 284, but the party is only bound to fence against cattle being *lawfully* in the adjoining close, Vin. Abr. Fences, B. 1; 2 Hen. Bla. 527.

(*x*) This averment must depend on the statements in the declaration.

(*y*) If the defendant suffered the cattle to remain in the close after notice, he will be liable as a trespasser, 2 Saund. 285, n. 4; Com. Dig. Pleader, 3 M. 29; 2 Leon. 93. But this is properly the subject-matter of a replication, &c. 2 Saund. 285, n. 4.

(*z*) The defendant may justify entering to re-chase cattle that escaped for want of fencing; 2 Roll. Abr. L. 35, 40; Com. Dig. Pleader, 3 M. 29.

(*a*) This averment should correspond with the statements in the declaration.

6. Licence. (*b*)

Licence.

Leave and licence.

And for a further plea in this behalf, the defendant says, that he the defendant, at the said several times when &c. by the leave and licence of the plaintiff to him for that purpose first given and granted, committed the said several alleged trespasses in the said declaration mentioned, as he lawfully might for the cause aforesaid. And this the defendant is ready to verify, &c.

Another plea of licence. (*c*)

And for a further plea in this behalf, as to the entering of the close of the plaintiff in which &c. the defendant says, that he the defendant, just before the said time when &c. was lawfully possessed, as of his own property, of a large quantity of [hay and straw], which before and at the said time when &c. was in and upon the close of the plaintiff, in which &c. and thereupon the defendant, at the said time when &c. by the leave and licence of the plaintiff, quietly and peaceably entered the close in which &c. in order to carry off from the said close the said [hay and straw], and did then and there quietly and peaceably take his said [hay and straw], and carry the same away from and out of the said close in which &c. as he lawfully might for the cause aforesaid. And this the defendant is ready to verify, &c.

7. Right of Entry to kill Game, &c.

Right of Entry to kill Game, &c.

See form of plea, &c. *Norris* v. *Dimes*, 3 Nev. & Man. 671; 1 Adol. & El. 654.

Plea justifying breaking and entering close and killing game, right of free warren over *locus in quo*. (*d*).

(*b*) As to this plea in general, see *ante*, vol. i. Index, "*Licence*;" Com. Dig. Pleader, 3 M. 35; Vin. Abr. Licence; 8 East, 308; 4 M. & S. 562; 1 B. & C. 634; 4 East, 107; and the precedents, 9 Wentw. Index, lxxxv. xciii.; Plea. Ass. 422; Lil. Ent. 426; see a plea of licence by *deed* from a part owner to sink pits, and replication, *Roberts* v. *Davey*, 4 Bar. & Adol. 664. In trespass a licence must be pleaded, and cannot be given in evidence under the general issue, 2 T. R. 166; 7 Taunt. 156; Hob. 174, 175; but see 21 Hen. 7, 28 a, *per* Rede, J. *contra*. Fighting being a breach of the peace, and unlawful, the consent of the plaintiff to fight would be no bar to his action; Bul. N. P. 18. If A. license B. to beat him, it is against the peace, and therefore void, Amb. 218; *sed query*, if the defendant might not plead a licence in such case except as to what is against the peace. It is sometimes advisable to plead a *contract* as a *licence*, as when the former is void under the Statute of Frauds; for a contract for the sale of an interest in land, without a note in writing, may operate as a licence so as to excuse the entry of the purchaser on the land, but it cannot he made available in any way as a contract; *Carrington* v. *Roots*, 2 M. & W. 248. It has been usual, in the introductory part of the plea, to enumerate all the trespasses, which, in point of law and in fact, may be justified by the licence, but this is seldom necessary. As to the evidence and replication, see 11 East, 451; *Feltham* v. *Cartwright*, 5 Bing. N. C. 569; *Wood* v. *Manley*, 11 A. & E. 34; 3 P. & D. 5, S. C.

As to replication of countermand, see 2 Saund. 113, 5th edit.; 8 Taunt. 31; 8 East, 308; 5 B. & C. 221; 7 D. & R. 783, S. C.

A licence is not implied by law to the purchaser of goods (though sold under an execution or distress) to enter upon the premises of the former owner and take them away, although they have remained there with his assent, and to support a plea of leave and licence to an action of trespass for taking away goods under such circumstances there must be proof of an express agreement that the purchaser should enter on the premises and take the goods; *Williams* v. *Morris*, 8 M. & W. 488. A parol licence from A. to B. to enjoy an easement over A.'s land is countermandable at any time whilst it remains executory; and if A. conveys the land to another, the licence is determined at once, without notice to B. of the transfer, and B. is liable in trespass if he afterwards enters upon the land; *Wallis* v. *Harrison*, 4 M. & W. 538.

(*c*) See *Wood* v. *Manley*, 3 P. & D. 5.

(*d*) A proviso in a Local Inclosure Act "that nothing in the act contained should

RIGHT OF ENTRY TO KILL GAME, &c.

Plea to same action justifying under a grant. (e)

And for a further plea in this behalf, the defendant says, that long before the several times when &c., and before the plaintiff had any title or interest in the said closes, to wit, on the 14th October, 1712, S. V. and R. C. were seised in their demesne as of fee of and in the manor of —— with the appurtenances, in the county of ——, in trust for one R. W.; and being so seised the said R. W., S. V. and R. C., by a certain indenture then made between them of the one part, and one J. W. of the other part, [*profert,*] did according to their several estates and interests release and convey unto the said J. W., his heirs and assigns for ever, certain premises situate in East ——, in the said county, then being in the actual possession of the said J. W. by virtue of a lease thereof for one year theretofore made to him by the said R. W., S. V. and R. C., which said last mentioned premises had been and were, before and at the time of making the said indenture, part and parcel of the demesne of the said manor, and of which said last mentioned premises so released and conveyed as aforesaid, the said closes in which &c. in the said declaration mentioned then were and still are part and parcel; excepting and always reserving (*f*) out of the said release and conveyance unto the said R. W., S. V. and R. C., their heirs and assigns, free liberty with servants or otherwise to come into and upon the said last mentioned premises so released and conveyed as aforesaid, or any part thereof, and there to hawk, hunt, fish and fowl at any time thereafter at the will and pleasure of the said R. W., S. V. and R. C., their heirs and assigns, or any or either of them, without any let or contradiction of the said J. W., his heirs and assigns; and the said J. W. did thereby, in and by the same indenture, grant unto the said R. W., S. V. and R. C., their heirs and assigns, the said liberty so mentioned therein to be excepted and reserved as aforesaid, as by the indenture fully appears; whereupon and whereby the said R. W., S. V. and R. C. became and were seised as of fee and right of and in the said liberty by the said indenture so granted to them as aforesaid. And the defendants further say, that after the making of the said indenture and while the said S. V. and R. C. were seised of and in the said manor with the appurtenances as aforesaid, and while the said R. W., S. V. and R. C. were so seised of and in the said liberty, to wit, on the 1st day of December, A. D. 1713, the said S. V. and R. C. by indenture under their hands and seals, which said last mentioned indenture having been by accident lost, the defendants cannot produce the same to the Court here, released and conveyed unto the said R. W., his heirs and assigns for ever, the said manor

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defeat, lessen or prejudice the right, title or interest of the lord of the manor, his heirs and assigns, of, in and to the seigniory and royalties incident and belonging to the manor, but that the present lord, his heirs and assigns, and all succeeding lords of the manor, should have, hold and enjoy all courts &c. with free warren and liberty of hunting, hawking, fishing and fowling &c. matters and things to the manor, or to the lord or to the lords thereof, for the time being, *incident, belonging* or *appertaining*, in as full, ample and beneficial a manner as if that act had not been made," does not reserve to the lord the right of sporting over the allotments of the moor or common; the object of that clause being to reserve to the lord all those manorial rights which he possessed before the inclosure as lord, except the right to the soil; and the power of the lord to sport over a waste within his manor, being, not a licence or liberty, but a mode of enjoyment of his own property; *Greathead* v. *Morley*, 3 M. & G. 139.

(*e*) See *Wickham* v. *Hawker*, 7 M. & W. 63, where see plea of prescriptive right under 2 & 3. Will. 4, c. 71, in the same action.

(*f*) This is not in law a *reservation*, properly so called, but a *new grant* by J. W. of the liberty, and therefore it was held that it might enure in favour of R. W. and his heirs, although he was not a party to the deed; *Id. ibid.*

Right of Entry to kill Game, &c.

with the appurtenances, then being in the actual possession of the said R. W. by virtue of a lease thereof for one year, theretofore made to him by the said S. V. and R. C., and in and by the said last mentioned indenture demised, released and for ever quit-claimed to the said R. W., his heirs and assigns for ever, all the right, title and interest of the said S. V. and R. C. of and in the said liberty so expressed to be excepted and reserved, and so granted in and by the said indenture first above mentioned as aforesaid; whereupon and whereby the said R. W. then became and was solely seised in his demesne as of fee of and in the said manor with the appurtenances, and solely seised as of fee and right of and in the said liberty, and the said R. W. being so seised, afterwards, to wit, on the 1st day of January, 1720, died so seised of and in the said manor with the appurtenances and liberty aforesaid. [*Proceed to deduce the title to the manor and liberty from R. W. to the defendant C. H. and conclude as follows:*] Wherefore the defendant P. H. in his own right, and the other defendants as his servants, and in his company (*g*) and by his command, at the said several times when &c. broke and entered the said closes in which &c. in the declaration mentioned, for the purpose of using and exercising the said liberty, and for that purpose and upon those occasions, with the horses, dogs and guns, in the said declaration mentioned, being the horses, dogs and guns of the defendant P. H., hunted and searched in the said closes for the game in the said declaration specified, and killed, seized, took and carried away the hares, pheasants, &c. therein mentioned, and converted and disposed thereof to the use of the said P. H. &c. as they lawfully might for the cause aforesaid, which are the said supposed trespasses &c. And this the defendants are ready to verify, &c.

8. Right of Fishery.

Right of Fishery.

Plea to trespass for *fishing* in a *several fishery*, that the *locus in quo* was defendant's freehold. (*h*)

And for a further plea in this behalf [as to the fishing in the said fishery in the said declaration mentioned, and the said fish there found and being, catching, seizing, taking, and carrying away, and converting, and disposing thereof to his own use,] (*i*) the defendant says, that the place in which the said alleged several fishery now is, and at the said several times when &c. was a certain close or parcel of land covered with water, and which said close or piece or parcel of land now is, and at the said several times when &c. was the close, soil and freehold of the defendant; wherefore the defendant at the said several times when, &c. entered into the said close,

(*g*) This is not necessary, for the grant is of a *licence of profit*, and not of a mere *personal licence* of pleasure, and therefore it authorises the grantee, his heirs and assigns, to hawk, hunt, &c. by his servants in his absence; *Wickham* v. *Hawken*, 7 M. & W. 63.

(*h*) As to pleas in general in trespass to fisheries, see *ante*, vol. i. Index, "*Pleas in Trespass*;" Co. Lit. 122 a, 126 b, note 7; 127 a, b; Com. Dig. Piscary; 9 Wentw. Index, xliii.; Boote's Suit at Law, 193 to 264; Plead. Assist. 401, 445; 5 Burr. 2162; 4 T. R. 437. See form of a plea justifying under a grant of a liberty and privilege of hunting for game with dogs, &c. 4 B. & C. 639; 7 D. & R. 49, S. C. The plea of *liberum tenementum* to trespass for fishing in a several or free fishery is good, see Year Book, 18 Edw. 4, 4; and though the subject-matter of it might have been given in evidence under the general issue, yet the plea was sometimes useful to compel the plaintiff to set forth in his replication his supposed right by prescription or grant.

(*i*) This enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

RIGHT OF FISHERY.

piece or parcel of land, and fished there for fish, and the said fish in the said declaration mentioned there found and being, caught, seized, took and carried away, and converted and disposed thereof to his own use, as it was lawful for him so to do for the cause aforesaid, which are the said several alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

Second plea, that the fishery was the defendant's *several* fishery. (*k*)

And for a further plea in this behalf, [as to the said alleged trespasses in the introductory part of the said last plea mentioned, and therein justified, (*l*)] the defendant says, that the said fishery in the said [first count] mentioned, and in which &c. now is, and at the said several times when &c. was the several fishery of the defendant; wherefore the defendant at the said several times when &c., being seasonable times of the year for that purpose, fished in the said fishery, and the said fish in the said declaration mentioned there found and being, caught, seized, took and carried away, and converted and disposed thereof to his own use, as it was lawful &c. [*As in the former plea to the end.*

Third plea, that the defendhas a right of *free* fishing in the fishery.

Same introduction as above.] That he the defendant, before and at the said several times when &c. in the said declaration mentioned, was and still is seised in his demesne as of fee of and in divers, to wit, two thousand acres of land with the appurtenances, situate and being in the parish aforesaid, and that the defendant and all those whose estate he now hath, and at the said several times when &c. had, of and in the said land with the appurtenances, *from time whereof the memory of man is not to the contrary*, have had, and have been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have, *a free fishery* in the said fishery in the said declaration mentioned, in which &c. and during all the time aforesaid fished and have been used and accustomed to fish, and of right ought to have fished, and still of right ought to fish in the same fishery for fish every year, at all seasonable times of the year for fishing, at his and their free will and pleasure, and to take and carry away the fish from time to time caught by them therein, as belonging and appertaining to the said land with the appurtenances. Wherefore the defendant, at the said several times when &c., the same being seasonable times of the year for that purpose, fished in the said fishery in this plea mentioned, and in which &c. And the said fish in the said declaration mentioned there found and being, took and carried away, and converted and disposed thereof to the use of the defendant as he lawfully &c. [*Same conclusion as in the first plea.*

Fourth plea, common of fishery. (*m*)

The plea of common of fishery is precisely similar to the former plea of free fishery, inserting the words "common of fishery," *instead of the words* "free fishery."

(*k*) See a form of a claim of a right of fishing by prescription, Lil. Ent. 449.

(*l*) See note (i), *supra*.

(*m*) A common of fishery is not correctly described by saying "a common fishery;" 2 Moore, 83; 8 Taunt. 183, S. C. As to evidence under this plea, *id.* 283.

RIGHT OF FISHERY.

Same introduction as in the plea, ante, 369.] Because he says, that the said alleged fishery in which &c., at the said several times when &c., was and still is, *and from time immemorial hath been,* part and parcel of the said river, called the ——, and that the said part thereof in which &c. now is, and at the said several times when &c. was, *and from time whereof the memory of man is not to the contrary* hath been, a public and common navigable river, in which the tides and waters of the sea during all the time aforesaid have flowed and reflowed, and that in the said part of the same river called the ——, in which &c. every subject of this realm at the said several times when &c. of right had, and of right ought to have had, and still hath, and of right ought to have, the liberty and privilege of fishing. Wherefore the defendant, being a subject of this realm at the said several times when &c., entered into the said fishery, in which &c. so being part of the said navigable river as aforesaid, where the tides and waters of the sea flow, to fish in the said river there, at the said several times when &c., being seasonable times of the year for such fishing, and at those several times did fish there, as it was lawful, &c. [*Conclude as in the first plea.*

Fifth plea, *locus in quo* a navigable river, and all the queen's subjects have right to fish therein.

And for a further plea in this behalf, the defendant says, that the said weir, stakes, and pleaching work of wood of the plaintiff in the declaration mentioned, before the said times when &c., had been wrongfully erected and placed and set up in and across part of a certain public navigable river called the Severn, and that the said part of the said river called the Severn, in which &c. was a part of the said river, situate between certain places, to wit, Worcester in the county of Worcester, and Shrewsbury in the county of Salop, and that the said river now is, and at the said several times when &c. was a public and common navigable river for all the liege subjects, &c. to navigate and pass with barges on the said river between Worcester and Shrewsbury, and that all the liege &c. before and at the said times when &c. of right ought to have navigated and passed, and still of right ought to navigate and pass, with barges in and along the said river from Worcester aforesaid to Shrewsbury aforesaid, at all times of the year at their free will and pleasure. And the defendants further say, that they the defendants, being liege subjects &c., at the said several times when &c. had occasion to use the said river, and to navigate and pass in and along the said river between Worcester aforesaid and Shrewsbury aforesaid, with a certain barge of the defendants, in going and passing from Worcester aforesaid to Shrewsbury aforesaid, and had navigated and passed with the said barge in and along the said river from Worcester aforesaid to the said part of the said river in which &c.; and because the said weir &c. had before the said several times when &c. been wrongfully erected &c. and were then wrongfully remaining and standing in and across the said part of the said river in which &c. and obstructing the same, and because a certain other part of the said river near and adjoining to the said part of the said river in which &c. was at the said times when &c. choked and stopped up, so that without breaking down,

For throwing down a weir appurtenant to a fishery, plea that the weir was wrongfully erected across part of a navigable river, where the queen's subjects had a right to navigate, and that the rest of the river was choked up so that defendants could not navigate without breaking down the weir. (*n*)

(*n*) See plea and subsequent pleadings, *Williams* v. *Wilcox*, 8 A. & E. 314; 3 N. & P. 606, S. C. A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the crown before the commencement of the reign of Edward the First; and such a grant may be inferred from evidence of its having existed before that time; *Id. ibid.*

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throwing down, prostrating and destroying the said weir &c. the said defendants could not then navigate or pass with their said barge through, over and along the said river from Worcester aforesaid to Shrewsbury aforesaid, as they ought to have done, and because the defendants could not then remove the obstructions in or upon the said other part of the said river which was so choked and stopped up as aforesaid, or pass over or navigate the said part of the said river in which &c., the defendants at the said several times when &c., in order to remove the said obstruction in the said part of the said river in which &c. and to enable themselves to pass with and navigate their said barge in and upon the said part of the said river in which &c., broke down &c. the weir and the materials thereof, to wit, &c., and took and carried away the same to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage, as they lawfully might for the cause aforesaid, which are the same &c. And this the defendants are ready to verify, &c.

PLEADING PRESCRIPTIVE RIGHTS.

OF PLEADING PRESCRIPTIVE RIGHTS AND OTHER ANCIENT RIGHTS

AS WELL BEFORE AS SINCE STATUTE 2 & 3 W. 4, c. 71.

Observations on the *former* modes of stating a *prescriptive right* of way, common, &c. and the *present* modes.

Before the statute 2 & 3 W. 4, c. 71, (see the whole act, *ante*, vol. i. 728,) in a plea of trespass justifying under a *prescriptive right* of common or way, or any other ancient right, although it in general sufficed in *evidence* to prove the uninterrupted exercise of the right for twenty years or upwards, and from such evidence the *immemorial right was presumed*, yet in pleading it was necessary to show who was seised *in fee* of the house or land in respect of which the right of common or of way &c. was claimed, and then to aver that *immemorially* all the ancestors of the party so seised were entitled to, and from time to time actually used and enjoyed, the exercise of such right, and frequently it was necessary to deduce the title through many conveyances or wills from the person so seised in fee. This occasioned great prolixity in pleading and useless increase of expense. To remedy these objections the statute 2 & 3 W. 4, c. 71, s. 5, was passed, and which enacts, "that in all actions upon the case and *other pleadings*, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that *in all pleadings to actions of trespass, and all other pleadings* wherein before the passing of this act it would have been necessary to allege the right to have *existed from time immemorial*, it shall be sufficient to allege *the enjoyment thereof as of right by the occupiers of the tenements, in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case*, and without claiming in the name or right of the *owner of the fee*, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact, or of law, not inconsistent with the simple fact of enjoy-

In actions on the case the claimant may allege his right generally as at present.

In pleas *to trespass and other pleadings*, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied specially.

ment, the same shall be *specially alleged* and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." *See the rest of the statute*, vol. i. Appendix, 728.

The altered mode of stating a prescriptive right of way or of common since 2 & 3 W. 4, c. 71.

Since this enactment, pleas of right of *common* or of *way*, &c. need not contain any allegations of *seisin in fee* in any person, but usually begins by stating, "that the defendant before and at the said time when &c. was and still is *the occupier* of a certain messuage and land, with the appurtenances, situate in the parish aforesaid; and that he the defendant, and the occupier for the time being of the said messuage and land and appurtenances, *for thirty years*, [*or*, 'twenty years,' *according to the facts, and as may be essential, see the whole act printed*, vol. i. 728] next before the commencement of this suit have and each of them hath actually had, used and enjoyed as of right and without interruption, and each of them hath been accustomed to have and enjoy as of right and without interruption a certain way, &c." The act gives a new form of plea, and if the defendant, instead of resorting to the old form of pleading, sets up a claim under this act, he must bring himself within the precise words of it; *per* Lord Denman, in *Halford* v. *Hankinson*, 13 Law J. Rep. (N. S.) Q. B. 116. A plea of prescription is supported, if the party prove a right more extensive than that pleaded; but the right proved must be of such a nature that it may comprehend the right pleaded; *per* Coleridge J. *Bailey* v. *Appleyard*, 8 A. & E. 161. The words "enjoyed by any person claiming right," (2 & 3 Will. 4, c. 71, s. 2) and "enjoyment thereof as of right," (in s. 5) mean an enjoyment not secretly or by tacit sufferance, or by permission asked from time to time, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass; *Tickle* v. *Brown*, 4 A. & E. 369. The plea will not be defeated by proof of an agreed alteration in the line of way nor by a temporary non-user under an agreement of the parties; *Payne* v. *Shedden*, 1 M. & Rob. 382. (*o*)

1. Right of Way.

Modern form of plea of right of way according to 2 & 3 W. 4, c. 71, ss. 2 & 3. (*o*)

And for a further plea in this behalf, as to the alleged trespasses in the [first] count of the declaration mentioned, the defendant says, that before and at the said several times when &c. he the defendant was and still is the occupier of a certain close called ——, contiguous and next adjoining to the close in which &c. and that the occupiers for the time being of the said close called ——, for the full period of twenty years next before the commence-

(*o*) As to the duty of the defendant to fix the precise locality where it becomes material to the defence, as where more than one right of way is claimed through the *locus in quo*, see *Ellison* v. *Iles*, 11 A. & E. 665; 3 P. & D. 391. This plea must be supported by user for that period down to the commencement of the action, and proof of user commencing twenty or forty years ago, but discontinued four or five years before the commencement of the action, is insufficient; *Parker* v. *Mitchell*, 11 A. & E. 788; 3 P. & D. 655, S. C.; *Onley* v. *Gardiner*, 4 M. & W. 496. See form, *post*, 389.

RIGHT OF WAY.

ment of this suit, (*p*) as of right have had and used, and as of right have been accustomed to have and use, and as of right (*q*) ought to have had and used, and the defendant at the said several times when &c. as of right ought to have had and used, and still as of right ought to have and use, a certain way &c. [*As in the old precedents.*

Plea justifying as occupier under an implied right of way for twenty years. (*r*)

And for a further plea in this behalf, except as to the forcing and breaking open, breaking to pieces, damaging and spoiling the said gates and the said locks, staples and hinges, the defendants say, that the said J. B., long before and at the said several times when &c. was and still is the occupier of a certain farm, tenement and premises, called M., situated and being in the parish aforesaid, in the county aforesaid, in part contiguous to and next adjoining to a certain place called M. Common, situate in the same parish and county, and that he the said J. B., whilst such occupier as aforesaid, and all other prior occupiers of the said farm, tenement and premises called M., for the full period of twenty years next before the commencement of this suit, and before either of the said times when &c. (*s*) as of right have had, used and actually enjoyed without interruption, and as of right (*q*) have been accustomed to have and use and actually enjoy without interruption, and as of right ought to have had and used and actually enjoyed without interruption, and the said J. B. at the said several times when &c. as of right ought to have had and used and actually enjoyed without interruption, and still as of right ought to have and use and actually enjoy without interruption, for himself and themselves, and his and their servants, whilst occupiers of the said farm, tenements and premises called M., a certain way to pass and repass on foot, and with their cattle and sheep, from and out of the said place called M. common, being contiguous to and next adjoining the said close in which &c. into, through, over and along the said close in which &c. unto and into a certain place, waste or common, called H. Down, situate in the county aforesaid, and so from thence back again, unto, into, through, over and along the said close in which &c. unto and into the said place called M. Common, at all reasonable times of the year, at his and their free will and pleasure, for the purpose of depasturing, grazing and feeding his and their cattle and sheep in and upon the said place, waste or common, called H. Down, and of looking after, attending to, watching, keeping and taking care of the same while there, as to the said farm, tenement and premises belonging and appertaining, and the said J. B. being such occupier as aforesaid, and having occasion to use the said way, he the said J. B. in his own right, and the other defendants as his servants and by his command in that behalf, at the said several times when &c. being reasonable times in that behalf, passed and repassed on foot and with his cattle and sheep, into, unto, through, over and along the said close in which &c. by and along the said way, from and out of the said place

(*p*) See *Wright* v. *Williams*, 1 M. & W. 77; *Richards* v. *Fry*, 3 N. & P. 67.

(*q*) It is not sufficient in a plea of a right of way under 2 & 3 W. 4, c. 71, ss. 2, 5, to state that the occupiers of the tenement in respect of which it is claimed for twenty years before &c. have had, used and actually enjoyed the way in question "of right," and still "of right" ought to have, use and enjoy it; and an omission to state the enjoyment to have been "as of right," within the very terms of the act of parliament, will not be cured by verdict; *Halford* v. *Hankinson*, 13 L. J. R., N. S., Q. B. 115.

(*r*) See form of similar plea, *Cowling* v. *Higginson*, 4 M. & W. 246.

(*s*) See a similar plea in *Monmouth Canal Company* v. *Harford*, 1 C. M. & R. 621, 622.

called M., into and unto the said place or common called H. Down, and so from thence back again into and unto the said place called M. Common, the said J. B. in his own right, and the other defendants as his servants, and by his command in that behalf, using the said way there for the purpose and on the occasion aforesaid of depasturing, grazing and feeding his cattle and sheep in and upon the said place, waste or common, called H. Down, and of looking after, attending to, watching, keeping and taking care of the same while there, as they lawfully might for the cause aforesaid. And in so doing the defendants, with their feet in walking unavoidably a little trod down, trampled upon, crushed, consumed and spoiled the said grass and herbage by the plaintiff there growing and being in the said close in which &c. in the said way there, a little trod down, turned up, subverted, damaged and spoiled, the said soil of the said close, and because the said walls and fences in the said declaration mentioned, before the said several times when &c. had been wrongfully built up and were then erected, standing and being in and across the said way, obstructing the same, so that without breaking down, pulling down, prostrating and destroying the said walls and fences respectively, the said J. R. could not then go, pass and repass in the said way into, through, over and along the said close in which &c. as he of right ought to have done on the occasion aforesaid, the said J. R. in his own right, and the said other defendants as their servants and by his command in that behalf, at the said several times when &c. in the said declaration mentioned, in order to remove the said obstruction, did break down, pull down, prostrate and destroy the said walls and fences respectively in the said declaration mentioned, and the materials thereof, the said J. R. in his own right, and the said other defendants as his servants and by his command in that behalf, removed to a proper and convenient distance, and there left the same for the use of the plaintiffs, the defendants doing no unnecessary damage to the plaintiffs on those occasions, which are the same alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiffs have above complained against the defendants. And this the defendants are ready to verify, &c.

Plea of right of way over the *locus in quo* from a highway to the defendant's house and back. (*t*)

And for a further plea in this behalf, the defendant says, that he the defendant long before and at the said several times when &c. in the declaration mentioned, was the lawful occupier of a messuage and divers, to wit, three closes of land, with the appurtenances respectively, situate in the county aforesaid, and near to the said close of the plaintiff in the declaration mentioned in which &c.; and the defendant further says, that he the defendant and all the occupiers for the time being of the said messuage and closes of the defendant have, and each of them hath as of right had, used and enjoyed, and have and each of them hath been accustomed as of right to have, use and enjoy, for and during the full period of twenty years next before the commencement of this suit, a certain way for himself and themselves, and his and their servants, to go, pass and repass on foot and with horses, mares, geldings, carts, waggons and other carriages, from and out of a certain common highway in the county aforesaid, towards, unto, into, through, over and along the said close of the plaintiff in the declaration mentioned, and in

(*t*) See *Colchester* v. *Roberts*, 4 M. & W. 769. See note (*q*), *ante*, 374.

RIGHT OF WAY. which &c., and from and out of the same towards, unto and into the said messuage and closes of the defendant, and so from thence back again towards, unto, into, through, over and along the said close of the plaintiff in the declaration mentioned, and in which &c., and from and out of the same towards, unto and into the said common highway at all times of the year, at the free will and pleasure of the defendant and the said other occupiers for the time being of the said messuages and closes of the defendant, as to the said messuages and closes of the defendant belonging and appertaining; wherefore the defendant at the said several times when &c., being the lawful occupier of his said messuage and closes, and having occasion to use the said way, went, passed and repassed on foot and with his horses, mares, geldings, carts, waggons and other carriages in the declaration mentioned, the said carts, waggons and other carriages then being loaded with the stone, lime and building materials in the declaration mentioned, in, by, through and along the said way from the said common highway towards, unto, into, through, over and along the said close of the plaintiff in the declaration mentioned, and in which &c. towards, into and unto the said messuage and closes of the defendant, and so from thence back again, in, by, through and along the said way, towards, unto and into the said common highway as he lawfully might for the cause aforesaid; and in so doing &c. [*justify the trespasses*]. And this the defendant is ready to verify, &c.

RIGHTS OF COMMON.

2. RIGHTS OF COMMON, &c.

Justification by a *freeholder* and his servant under a *prescriptive* right of *common of pasture*. (u)

And for a further plea in this behalf, as to [*enumerating, if necessary, the trespasses proposed to be justified, and which must depend on the averments in the declaration, which, in the cases on which the following plea was framed, were the entry on the land, and putting on cattle, and filling up ditches, breaking down fences, &c.*] the defendants say, that before &c. [*here state the seisin in fee, which must be shown, as before the statute* 2 & 3 Will. 4, c. 71, *it was necessary to prescribe in the* que *estate for the right of common or of way, &c. Attorney-General* v. *Gauntlett,* 3 Young & Jerv. 93, *and as ante,* 308, 309, *observing the notes; or if the defendant be a tenant, after stating the seisin in fee and the right of common in the freeholder, set forth the demise as ante,* 308, *and then proceed as follows. But now the statute* 2 & 3 Will. 4, c. 71,

(u) See the forms referred to, 9 Wentw. Index, xliv. to l.; 2 Rich. C. P. 53. See also the forms, Rast. Ent. 618; 1 Saund. 222; 7 B. & C. 346; *Tapley* v. *Wainwright,* 5 Bar. & Adol. 395; and the notes to 1 Saund. 339 to 346, 347 to 353; 2 Saund. 1 to 6, and 324 to 329; Com. Dig. Pleader, 3 K. 24, Common; and Woolrych on Commons. As to the mode of pleading rights of common in general, see also the form and notes, *ante,* 372, and vol. ii. 611, &c. If the right of common be qualified either for a limited number or a particular description of cattle, or at particular times of the year, or if the defendant have any land in the *locus in quo*, the plea must be framed accordingly. As to the necessity of showing a seisin in fee, and pleading the right in a *que* estate, before the 2 & 3 Will. 4, c. 71, see 3 Younge & Jerv. 93; Co. Lit. 113 b; 4 T. R. 718; Cro. Car. 599; *ante,* 372. If there be any reason to apprehend that the *prescriptive* right of common may have been extinguished by unity seisin it is proper to add a plea claiming the right of common by non-existing grant, as in the plea of a right of way by grant, *post,* 393. See a replication that the *locus in quo* had been inclosed from the common thirty years, 2 B. & C. 918; 4 D. & R. 572, S. C.; 2 Taunt. 159. But *semble* that the general replication that the *locus in quo* was not parcel of the waste, will, in ordinary cases, suffice; —— v. *Smith and others,* Trinity Term, 1825, (Bond, attorney); and in 7 B. & C. 346, it was held there was no occasion to reply specially a custom to inclose.

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gives several modes of claiming and pleading prescriptive *rights, see post*, 391, &c.] Wherefore he the said C. D., in his own right, and the said E. F., as his servant and by his command, at the said times when &c. entered into the said close in which &c. in order to turn and put, (*x*) and did then turn and put into and upon the same the said cattle, horses &c. [*name them as in the declaration*] in the said declaration mentioned, being the said C. D.'s own commonable cattle *levant* and *couchant* in and upon the said last-mentioned land, with the appurtenances, to use † the said common of pasture of the said C. D. there, and in so doing they the said C. D. and E. F., at the said times when &c., with their feet in walking necessarily and unavoidably trod down, (*y*) trampled upon, spoiled, consumed and destroyed a little of the grass and hay, herbs, roots, shrubs and bushes there growing and being, and with the said cattle, horses &c. in the said declaration mentioned, necessarily and unavoidably trod down, trampled upon, spoiled, eat up, depastured, consumed and destroyed a little other of the grass and hay, herbs, roots, shrubs and bushes there also growing and being; and because the said close in which &c. before and at the said time when &c. had been and was wrongfully inclosed with and by means of the said ditches and fences and gates (*y*) in the said declaration mentioned, before then wrongfully dug and made and put and placed in and upon the said close in which &c. so that without filling up and levelling the said ditches and fences, and removing the said gates, the said C. D. could not use or enjoy his said common of pasture in, upon and throughout the said close in which &c. in so ample and beneficial a manner as he otherwise might and would and ought to have done, he the said C. D. in his own right, and the said E. F. as the servant of the said C. D., and by his command, at the said several times when &c. with the said pickaxes, (*y*) hatchets, saws and mattocks, and other instruments in the said declaration mentioned, filled up and levelled the said ditches, and dug up, threw down, and prostrated the said fences and gates, and took and carried the said gates to a small and convenient distance, where they left the same for the use of the plaintiff, doing no unnecessary damage to the plaintiff on the occasions aforesaid, and as they lawfully might for the cause aforesaid, which are the said several alleged trespasses in the introductory part of this plea mentioned, whereof the plaintiff hath above complained against the said C. D. and E. F. And this the defendants are ready to verify, &c.

Because the common was wrongfully inclosed by the ditches, &c. defendant prostrated the same. (*z*)

Enumerate the trespasses intended to be justified, as directed in the preceding

The like by a *copyholder*. (*a*)

(*x*) This allegation seems proper; 1 Rol. Abr. 406, I. 8; Com. Dig. Common, H.

(*y*) Let this agree with the statements in the declaration in this respect.

(*z*) A commoner may justify abating a fence wrongfully erected upon a common, but not trees planted thereon; 6 T. R. 487; 2 Mod. 65; Com. Dig. Common, H.; 7 B. & C. 346.

(*a*) See the notes to the last form, and as to the pleading right of common by a copyholder, 1 Saund. 348 to 353, in notes. See the mode of setting out title to copyhold, *ante*, 361, and vol. ii Index, *Copyhold Estate*. See also a copyholder's title set out under, *post*, 388. If the justification be by the tenant of a copyholder, the plea will be as in the above form, and after the statement of the grant to the copyholder, and his entry, setting forth the demise to the defendant, and his entry, as *ante*, 363.

The following is the substance of the case and decision in 9 B. & C. 671:—Trespass for breaking and entering the plaintiff's close, and treading down the grass &c. and breaking and destroying the hedges and fences of the plaintiff &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage and four acres of land,

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form.] That the said close in which &c. before and at the said several times when &c. was and is within and parcel of (*b*) the manor of —— in the said county; and that a certain messuage, and divers, to wit, ——(*c*) acres of land, with the appurtenances, situate and being in the parish of —— aforesaid, are now, and at the said several times when &c. were, *and from time immemorially have been*, within and parcel of the said manor, and a customary tenement thereof, demised and demisable by copy of the court-rolls of the said manor, by the lord of the said manor, or his steward of the court of the same manor, or the deputy steward of the said court for the time being, to any person or persons willing to take the same in fee-simple at the will of the lord, according to the custom of the said manor. And the defendant further says, that within the said manor there is, *and from time whereof the memory of man is not to the contrary* hath been, a certain ancient and laudable custom there used and approved of, (that is to say,) that every customary

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with the appurtenances, at the said several times when &c. were, and from time immemorial had been, within and parcel of the said manor, and a customary tenement of that manor, and that within the said manor there was, and from time whereof &c. there had been, an ancient custom *that every customary tenant of the said customary tenement*, with the appurtenances, should have common of pasture upon the plaintiff's close. That J. S. being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which &c. and put his cattle in, and because the hedges and fences had been improperly erected, threw them down. Replication, denying the custom of the customary tenant of the said customary tenement to have common of pasture, upon which issue was joined. Plea, second, a prescriptive right of common of turbary in respect of said customary tenement, consisting of a messuage and land. Replication, denying the custom in respect of such said customary tenement; upon which issue was joined, and new assignment, that the defendant entered for other purposes than those mentioned in the plea. To which defendant pleaded the general issue. It appeared in evidence, that at the time of the plea pleaded there was an ancient customary tenement, consisting of a dwelling-house and out-buildings, garden, and a small quantity of land, the customary tenant whereof had immemorially enjoyed such common of pasture in the plea mentioned; that for many years the defendant had been such customary tenant, and in 1812 had built a new dwelling-house on a part of the garden; that both the old and new dwelling-house continued to be occupied till 1823, when the former fell into decay, and was abandoned by the tenant, and then remained unoccupied until it was finally pulled down in 1825, from which time there had been no dwelling-house on the tenement, except the one built by the defendant in 1812. During the years in which both the old and new dwelling-houses were occupied, the tenant of the former continued to exercise such customary rights on the wastes of the manor in respect thereof as he had before, and during that period it did not appear that the occupier of the latter had exercised any customary rights on the wastes of the manor in respect thereof; but since the new dwelling-house had been alone occupied, the customary tenant of the tenement had claimed and enjoyed all the same rights in respect thereof as had been claimed and enjoyed at any former period, and among others the customary right stated in the second plea. It was held, that upon this evidence the defendant was entitled to have the issue joined upon the right of common of pasture found for him in respect of an ancient customary tenement.

In the same case it appeared that the defendants committed one trespass by breaking down a large portion of the fence which was standing upon the plaintiff's close, which the plaintiff had then newly erected upon the common, and that the defendants did so, really intending to assert and preserve their rights of common of pasture and of turbary; but that they broke down much more of the fence than was necessary for the convenient ingress and egress of men and commonable cattle into and upon that part of the close which was inclosed by the fence, and that they did not intend, at the time of committing of the trespass, to exercise any of the said rights of common, nor had they with them any commonable cattle. It was held, that upon this evidence the defendants were entitled to have the issue found for them upon the plea of "not guilty" to the *new assignment*.

In the same case it was made a question, but not decided, whether the defendants were entitled to have issue on the right of common of turbary found for them.

(*b*) This allegation seems material, for if the *locus in quo* be not parcel of the manor, the defendant must *prescribe in the name of the lord*, and not as in the above form; 1 Saund. 349, note 11; Com. Dig. Pleader, 3 K. 24. See forms, where a right of way is pleaded by a copyholder in another manor, 2 Lutw. 1327; Winch's Ent. 971, 972; Lib. Plac. 373, 374; and see *post*, 368, as to pleas of way by copyholders.

(*c*) The precise number of acres is not material.

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tenant of the said last-mentioned customary tenement, (*d*) with the appurtenances for the time being, *from time whereof the memory of man is not to the contrary*, hath had, and hath used and been accustomed to have, and of right ought to have had, and still of right ought to have, for himself, herself, his or her farmers, occupiers of such customary tenement, with the appurtenances, common of pasture in, upon and throughout the said close in which &c., for all his, her and their commonable cattle *levant* and *couchant*, in and upon the same customary tenement, with the appurtenances, every year, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to such customary tenement. And he further says, that long before any of the said times when &c., to wit, on &c., A. D. ——, one E. F. then being lord of the said manor, at his court, held in and for the said manor, before —— gent., then deputy steward of the said court, by copy of the court-rolls of the said manor, granted to the defendant (amongst other things) the said last-mentioned customary tenement, with the appurtenances, to hold the same to the defendant, his heirs and assigns for ever, by copy of the court-roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor; by virtue of which said grant the defendant afterwards, and before any of the said times when &c., to wit, on the day and year last aforesaid, entered into the said customary tenement, with the appurtenances, and became and was and still is thereof seised in his demesne as of fee at the will of the lord, according to the custom of the said manor, and at the several times when &c. was in the actual occupation thereof, and entitled to such common of pasture as aforesaid. Wherefore the defendant, at the said several times when &c. having occasion to use his said common of pasture, entered the said close in which &c. in order to put, and did then put into and upon the same, the said cattle in the said declaration mentioned, being his own commonable cattle *levant* and *couchant*, in and upon the said last-mentioned customary tenement, to use &c. [*Conclude, justifying the trespasses, as in the last form, ante, 377, from the* †, mutatis mutandis, *according to the fact.*

Grant of the copyhold to the defendant.

In order to frame the other parts of the plea, observe the direction ante, 376.] That he the defendant, long before and at the said time when &c., and continually from thenceforth hitherto hath been and still is rector of the rectory of the parish church of U. aforesaid, in the said county of D., and as such rector seised of a certain messuage and land, to wit, one acre of land, with the appurtenances, in his demesne as of fee, in right of his said church, and that he the defendant, and all and every his predecessors, rectors of the said rectory for the time being, *from time whereof the memory of man is not to the contrary*, have had and used, and have been used and accustomed to have and use, and during all the time aforesaid of right ought to have had and used, and the defendant, as rector of the said rectory, still of right ought to have and use common of pasture in, upon and throughout the said close in which &c. for all his and their commonable cattle *levant* and *couchant*, in and upon the said messuage and land with the appurte-

Prescriptive right of common by a rector in right of rectory. (*e*)

(*d*) When there is no evidence of exercise of a right of common by the occupier of the particular copyhold, it is advisable at least in one plea to lay the custom for all copyholders; see 2 H. Bla. 666.

(*e*) See also a form, Willes, 282.

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nances, at all times of the year, as to the said messuage and land with the appurtenances belonging and appertaining; and the defendant being such rector, and so seised and entitled as aforesaid, he the defendant afterwards, and before the said time when &c., to wit, on &c. in the said declaration mentioned, entered into the said first-mentioned close in which &c. in order to turn and put, and did then turn and put the horses, mares, geldings, cows, oxen and sheep in the said declaration mentioned, being his own commonable cattle *levant* and *couchant* in and upon, &c. [*Conclude as directed in the above form.*

Common pur cause de vicinage. (*f*)

Enumerate the trespasses intended to be justified, as directed in the form, ante, 376.] That the said close called —— in which &c. at the said times when &c. lay, and *from time immemorial* hath lain and still doth lie, contiguous and next adjoining to a certain other close or piece or parcel of land called ——, containing divers, to wit, —— acres of land, situate and being in a certain part of the said parish of ——, which lies in the county of ——, and hath never been separated or divided from the said last-mentioned close called ——, in the said county of ——, by any inclosure, hedge or fence whatsoever, sufficient to prevent cattle from time to time feeding and depasturing in the said close called ——, in the said county of ——, from erring or escaping therefrom into the said close called ——, in which &c. And that the said cattle from time to time during all that time duly put in the said close called —— to feed on the grass there then growing, [*or*, "to use the said common of pasture in and upon and throughout &c."] *from time immemorial* have gone, escaped and rambled, and have been used and accustomed to go, escape and ramble therefrom into the said close called ——, in which &c. and to intermix there and feed with cattle from time to time feeding on the grass growing in the said last-mentioned close; and in like manner the cattle from time to time during all that time, duly put into the said close called ——, in which &c. to feed on the grass there then growing, [*or*, "to use the said common of pasture in and upon and throughout &c."] *from time immemorial* have gone, escaped and rambled, and have been used and accustomed to go, escape and ramble therefrom into the said close called ——, in the said county of ——, and to intermix there and feed with cattle from time to time feeding on the grass growing in the said last-mentioned close. And the defendant further saith, that the said close called ——, in the said county of ——, before and at the said time when &c. was the close, soil and freehold of one E. F., and that the said cattle of the defendant in the said declaration mentioned, just before the said time when &c., to wit, on the same day and year aforesaid, were in and had been put into the said close called ——, in the said county of ——, to feed on the grass there then growing, by the leave and licence of the said E. F. to the defendant in that behalf first given and granted. And the defendant further says, that the said cattle, so being put and being in the said close called

(*f*) See the notes to the precedent, *ante*, 376; and Com. Dig. Common, E. Common, *per cause de vicinage* being merely an excuse for a trespass with cattle, the defendant cannot justify pulling down fences &c.; Com. Dig. Common, E.; and it cannot be set up as an excuse for cattle rambling from downs subject to common of pasture, into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs; *Heath* v. *Elliott*, 4 Bing. N. C. 388.

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——, in the said county of —— as aforesaid, for the purpose aforesaid, and the said close called ——, in which &c. so being and lying contiguous thereto, and not separated or divided therefrom by any inclosure, hedge or fence whatsoever, the said cattle of him the defendant afterwards, and just before the said time when &c., to wit, on the same day and year aforesaid, of their own accord, and without the knowledge or consent of the defendant, went, escaped and rambled from and out of the said close called ——, in the said county of ——, into the said close called ——, in which &c., and intermixed and fed with the cattle there then feeding on the grass there then growing, and remained and continued in the said close called ——, in which &c. on the occasion aforesaid, without the knowledge of the defendant, and there eat &c. [*Here justify the trespasses with the cattle, as in the form, ante, 377, and conclude as therein directed.*

See *Welcome* v. *Upton*, 5 M. & W. 398; 6 M. & W. 536.

Plea of right of herbage and pasturage in an open field. (*g*)

And for a further plea in this behalf &c. [*state the entry on foot and with carriages, throwing down of post and fences &c., and other trespasses which may be justified, and then as follows:*] That the said close in which &c. before and at the said several times when &c. had divers large quantities of bushes and underwood growing thereon. And the defendant further saith, that he the defendant, before and at the said several times when &c., was seised in his demesne as of fee of and in a certain messuage, with the appurtenances, situate and being in the parish aforesaid, and that he the defendant and all those whose estate he now hath, and at the said several times when &c. had, of and in the said last-mentioned messuage with the appurtenances, for the time being, *from time whereof the memory of man is not to the contrary*, have had and taken, and been used and accustomed to have and take, and of right ought to have had and taken, and the defendant still of right ought to have and take, reasonable estovers of the bushes and underwood standing and growing in and upon the said close in which &c., and to carry the same from thence to the said messuage, with the appurtenances, to be burnt, spent and consumed for fuel therein every year, and at all seasonable times of the year, at his and their free will and pleasure, as belonging and appertaining to such last-mentioned messuage, with the appurtenances. Wherefore he the defendant, at the said several times when &c., having occasion for such reasonable estovers as aforesaid to be burnt and consumed for fuel in the said last-mentioned messuage, at the several times when &c., being seasonable times of the year in that behalf, entered the said close in which &c. with the said cattle and carriages in the said declaration mentioned, in order to take and carry such reasonable estovers as aforesaid from thence to the said last-mentioned messuage to be burnt, used and consumed for fuel therein; and the defendant on those occasions with his feet

Common of estovers &c. (*h*)

(*g*) This is not a claim to a "right of common or other profit or benefit to be taken and enjoyed from or upon any land" within the 2 & 3 W. 4, c. 71, s. 1; but it is doubtful whether it is within the fifth section of the same act, so as to allow of its being pleaded as a prescriptive right; *Welcome* v. *Upton*, 5 M. & W. 398; and 6 M. & W. 536; 7 Dowl. 475, S. C.

(*h*) See the notes to the form, *ante*, 376; and Thomp. Ent. 377; see the forms of pleas of common of *turbary*, 7 East, 121; 1 Taunt. 435; 9 B. & C. 671; and *ante*, vol. ii. 611, &c.; and of a right to dig stones or sand, 6 T. R. 748; Plead. A. 499.

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in walking, and by and with the said cattle and carriages, a little trod down, trampled upon, consumed and spoiled the grass and herbage then growing and being in the said close, and subverted, damaged and spoiled the soil of the said close, and because the said stakes, banks, mounds, gate-posts, and other posts in the said declaration mentioned, before the said several times when &c. had been wrongfully erected, and were then standing and being in and upon the said close in which &c. and partly inclosing the same, so that without some digging up, pulling up, tearing up, breaking down, throwing down, prostrating and destroying the said banks, mounds and fences, gate-posts and other posts respectively, the defendant could not then have, take and carry from the said close such reasonable estovers as aforesaid, to be burnt, used and consumed for fuel in the said last-mentioned messuage, as he otherwise might and ought to have done; he the defendant, at the said several times when &c., in order to remove such obstructions as last aforesaid, dug up, tore up, broke down, threw down, prostrated and destroyed the said stakes, banks, mounds, fences, gate-posts and other posts in the said declaration mentioned, and took and carried the said gate-posts and other posts to a small and convenient distance, where he left the same for the use of the plaintiff, doing no unnecessary damage to the plaintiff on those occasions, which are the same alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

Pleas of prescriptive and other rights to enter and dig for minerals. (i)

See *Paddock* v. *Forrester*, 3 M. & G. 903; *Hoyle* v. *Coupe*, 9 M. & W. 450.

Plea of custom for tenants of copyhold to dig for coal, &c. (k)

And for a further plea in this behalf, as to the conversion and disposition of the said coals in the declaration mentioned, the defendant says, that divers, to wit, fifty acres of land, with the appurtenances, situate in the parish of ——, in the county of ——, before and at the said time when, &c. were and from time immemorial have been within and parcel of the manor of —— and ——, in the said county of ——, and a customary tenement thereof, demised and demisable by the lord of the said manor or his steward of the courts of the said manor, for the time being, to any person or persons willing to take the same in fee simple, at the will of the lord, according to the custom of the said manor, by and under the rents, customs and services theretofore due and of right accustomed. And the defendants further say, that within the said manor there is and hath been a certain ancient and laudable custom there used and approved of, that is to say, that every customary tenant of each and every customary tenement within and parcel of the said manor for the time being, from time whereof the memory of man is not to

(i) The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription, but aliter, of a right to take coal in another man's land; *Wilkinson* v. *Proud*, 11 M. & W. 33. A prescription to enter and dig for minerals, *making compensation*, is an entire prescription, and will not support the affirmative of an issue taken upon a plea justifying under a prescription to enter and dig for minerals, omitting the qualification as to making compensation; but in a plea stating such prescription correctly, it is not necessary to allege that compensation has been made or tendered; *Paddock* v. *Forrester*, 3 M. & G. 903.

(k) See *Marquis of Anglesea* v. *Lord Hatherton*, 10 M. & W. 218. This plea was pleaded to an action of trover, but it may easily be made applicable to trespass.

the contrary, respectively hath had and used and been accustomed to have, and of right ought to have had, and still of right ought to have, for himself or herself respectively, all and every the mines, veins, seams and beds of coal lying or being or to be found under the soil of each and every of the said customary tenements respectively, together with full and free liberty for each and every of the said customary tenants respectively, and for his or her workmen or servants to open, search for, dig, get and win the said mines, veins, seams and beds of coal, so lying and being or to be found under the soil of each and every of the said customary tenements respectively, and the coals thence arising to take, carry, convey or otherwise dispose of at his or her free will. And the defendants further say, that long before the said time when &c. to wit, on the 26th day of October, 1825, the plaintiff, then being lord of the said manor, at his court holden in and for the said manor before T. H. Esq., then steward of the said court, granted to the defendant Edward John, Lord Hatherton (by his then name and style of Edward John Littleton, Esq.) and to J. W. Esq., since deceased, amongst other things, the said customary tenement in this plea first mentioned, with the appurtenances, to hold the same to the said Edward John, Lord Hatherton, and the said J. W., and the survivor of them and their heirs for ever, at the will of the lord of the said manor, according to the custom of the said manor, by and under the rents, customs and services therefore due and of right accustomed; by virtue of which said grant the defendant Edward John, Lord Hatherton, afterwards and before the said time when &c. to wit, on the day and year last aforesaid, entered into the said last mentioned customary tenement with the appurtenances, and became and was thence continually, until and at the said time when &c. seised thereof in manner aforesaid, and entitled to the said mines, veins, seams and beds of coal lying and being or to be found under the soil of the said last mentioned customary tenement; wherefore the said defendant Edward John, Lord Hatherton, whilst he was so seised and entitled as aforesaid, and after the death of the said J. W. and before the said time when &c. to wit, on the 1st day of January, 1839, opened, searched for and dug certain mines, veins, seams and beds of coal then lying and being under the soil of the said last mentioned customary tenement, and then took, got, won and carried away therefrom divers, to wit, 1000 tons of coals, which are the same coals as are in the said declaration and in the introductory part of this plea mentioned; and the defendants further say, that afterwards and before the said time when &c. to wit, on the day and year last aforesaid, the said Edward John, Lord Hatherton, delivered the said coals to one R. R. to be kept by the said R. R. to and for the use of him the said Edward John, Lord Hatherton; and the said R. R. afterwards, and just before the said time when &c. to wit, on the day and year last aforesaid, in violation of his said trust, delivered the said coals to the plaintiff, who thereby then became and was posssessed thereof; whereupon the said Edward John, Lord Hatherton, in his own right, and the said H. B., as his servant and by his command, at the said time when &c. took the said coals from and out of the possession of the plaintiff, as they lawfully might for the cause aforesaid, which is the same conversion and disposition as in the introductory part of this plea mentioned. And this the defendants are ready to verify, &c.

PUBLIC WAYS.

3. PUBLIC WAYS.

Public way for carriages, &c. (*l*)

Enumeration of the trespasses intended to be justified.

And for a further plea in this behalf, [as to the entering the said close of the plaintiff, in the said declaration mentioned, and in which &c. and with feet in walking, and with the said cattle and carriages in the said declaration mentioned, treading down, trampling upon, crushing, consuming and spoiling the grass and herbage then growing and being in the said close, and subverting, damaging and spoiling the soil of the said close, and digging up, pulling up, tearing up, prostrating and destroying the said stakes and posts in the said declaration mentioned, and with the said cattle in the said declaration mentioned eating up and depasturing the said other grass of the plaintiff there also growing and being, and also as to the breaking down, throwing down, prostrating and destroying the said banks, mounds and fences, and also as to digging up, pulling up, prostrating, damaging and destroying the said gate-posts and other posts in the said declaration mentioned, and taking and carrying away the same, above alleged to have been done by the defendant, (*m*)] he the defendant says, that * before and at the said several times when &c. there was, and of right ought to have been, a

The public way. (*n*)

certain common and public highway into, through, over and along the said close, in which &c. for all the liege subjects of our lady the queen to go, return, pass and repass on foot and with cattle and carriages at all times of the year, (*n*) at their free will and pleasure. Wherefore the defendant being

Wherefore defendant entered, and the cattle by stealth and morsels eat the grass in the way.

a liege subject of our said lady the queen, and having occasion to use the same way at the said several times when &c. went, passed and repassed on foot and *with the said cattle* and carriages (*o*) into, through, over and along the said close, in which &c. in, by and along the said highway there, using the same as he lawfully might for the cause aforesaid.† And in so doing the defendant with his feet in walking and with the said cattle and carriages unavoidably a little trod down, (*o*) trampled upon, consumed and spoiled the grass and herbage then growing and being in the said close, in which &c. and subverted, damaged and spoiled the soil of the same close, and the said cattle at the said several times when &c. in passing and repassing along the said way by stealth (*p*) and morsels, and against the will of the defendant, eat up and depastured a little other of the grass there then growing in the said way. And because the said stakes, (*o*) banks, mounds, fences, gate-posts and other posts in the said declaration mentioned, before the said several times when &c. had been wrongfully erected, and were then standing in and across the said highway and obstructing the same, so that without dig-

Because the fences, &c. obstructed the way, defendant prostrated same and carried materials to a convenient distance.

(*l*) See forms, 9 Wentw. Index. lvi; 1 Hen. Bla. 351; Lil. Ent. 426. In pleading a public way, it is not necessary to state the *termini*, or to show that it was immemorially a way, the term "public highway" being sufficient; 1 Hen. Bla. 351, 355; 2 Saund. 158 d; *ante*, vol. ii. 617; 8 East, 6; 3 T. R. 265; 8 T. R. 60; 3 Burn, J, 26th edit. 68. See a form of right of way by inhabitants of a town, Lutw. 1507.

(*m*) The enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in most cases may be wholly unnecessary.

(*n*) If the right of way be qualified, it must be described accordingly, 4 Campb. 190; as if the way be merely a footway, or only a horse-way; or if it be to be used only at particular times, see 3 Burn, Just. 26th edit. 67, 68, and cases there collected.

(*o*) This must depend on the statements in the declaration. *Cattle* must be *driven* along a highway, and not suffered to wander or pass along by themselves, and if they be, and they damage the fence or get into an adjoining close, they will be trespassing; *Dewston* v. *Payne*, 2 Hen. Bla. 527.

(*p*) Some of the older precedents say by *snaps* and morsels, Pleader's Asst. 493, which seems better than ascribing *stealth* to cattle.

ging up, pulling up, tearing up, breaking down, throwing down, prostrating and destroying the said stakes, banks, mounds, fences, gate-posts and other posts respectively, the defendant could not then pass and repass with the said cattle and carriages into, through, over and along the said close in which &c. in the said highway there, as he ought to have done, the defendant at the said several times when &c. in order to remove the said obstructions, dug up, (*p*) pulled up, tore up, broke down, prostrated and destroyed the said stakes, mounds, fences, gate-posts and other posts in the said declaration mentioned, and took and carried the said gate-posts and other posts to a small and convenient distance, and there left the same for the use (*q*) of the plaintiff, doing no unnecessary damage to the plaintiff on those occasions, which are the same alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

Plea justifying defendant's entering plaintiff's close and breaking gates &c. because a highway adjoining the close was out of repair, and continued impassable, wherefore defendant, through necessity, entered, &c. (*r*)

And for a further plea in this behalf, as to the breaking and entering the said close, &c. [*if necessary, enumerate the trespasses stated in the declaration and intended to be justified,*] the said defendant says, that before and at the said time when &c. and on the several other days and times in the said declaration mentioned, there was, and of right ought to have been, a certain common and public highway, running by and lying close to and adjoining the said close of the plaintiff, in which &c. in the said first count mentioned, for all the liege subjects of our lady the queen, to go, return, pass and repass on foot and with horses, mares and geldings, and other cattle, and with waggons, carts and other carriages, at all times of the year, at their free will and pleasure. And the defendant further saith, that he the defendant, being a liege subject of our said lady the queen, was desirous and had occasion, and was about to go and pass, and did endeavour to go and pass in, through, over and along the said common and public highway, with the said waggons and carts drawn by the said horses, mares and geldings in the said declaration mentioned, but a great part, to wit, [ten yards] in length, and [ten yards] in breadth, of the said common or public highway, was then so miry, deep, foundrous, ruinous, and in such bad state and condition as to be wholly impassable by the defendant with his said waggons and carts, and horses, mares and geldings, as by other liege subjects of our said lady the queen; and because the said close of the plaintiff in which &c. in the said declaration mentioned, so lying contiguous and next adjoining the said common and public highway as aforesaid, was the most commodious and necessary way for him the defendant to break out of the said highway so miry, deep, foundrous, ruinous and in such bad state and condition as aforesaid, to go and procced towards B. in that county aforesaid, with the said waggons and carts, and with the said horses, mares and geldings, he the defendant, at the said time when &c. with the said carts and waggons, and the said horses, mares and geldings, did necessarily and unavoidably, and in order to proceed forward and towards B. aforesaid, a little break out of the said &c. part of the said highway so miry &c. as aforesaid, and enter, and go, and pass over that part of the said

(*p*) See note (*o*) in preceding page.

(*q*) This is traversable, see 4 T. R. 364; 1 Stark. C. N. P. 173; and see the form of replication *post*.

(*r*) As to this plea, see 2 Show. 20; 2 Lev. 234, S. C.; 1 Ld. Raym. 749; 3 Burn, J. 26th edit. 7, and see 28th edit.

PUBLIC WAYS. close of the said plaintiff in which &c. in the said declaration mentioned, which lay close to and immediately adjoining the said common or public highway, so being in such state and condition as aforesaid, as it was lawful for him to do for the cause aforesaid, and in so doing he the defendant with feet in walking did a little break down, trample upon, and consume and spoil a little of the grass and corn then growing and being, and with the feet of the said horses, mares and geldings, and also with the wheels of the said carts and waggons did necessarily and unavoidably a little crush, damage and spoil a little other the grass and corn of the plaintiff then also growing and being, and with the feet of the said horses, mares and geldings, and with the wheels of the said carts and waggons, a little trampled, damaged and spoiled the earth and soil of the plaintiff in the said part of the said close so lying close to and immediately adjoining the said common or public highway as aforesaid, and did then necessarily and unavoidably a little cut down and destroy, prostrate and level, a little of the trees and underwoods, hedges, gates and fences in the said last part of the said close there growing, erected and being, doing on those occasions no unnecessary damage to the plaintiff, which are the same alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above complained against him. And this the defendant is ready to verify, &c.

Plea of a public footpath.

And for a further plea in this behalf, the defendant says, that before and at the said several times when &c. in the declaration mentioned, there was, and of right ought to have been, a certain common and public footway into, through, over and along the said close in which &c. for all the liege subjects of our lady the queen to go, return, pass and repass on foot, at all times of the year, at their free will and pleasure, wherefore the defendant, being a liege subject of our said lady the queen, and having occasion to use the said way at the said several times when &c. passed and repassed on foot into, through, over and along the said close in which &c. in, by and along the said public and common footway, there using the same as he lawfully might for the cause aforesaid, and in so doing the defendant with his feet in walking unavoidably a little trod down, trampled upon, consumed and spoiled the said grass and corn of the plaintiff, then growing and being in and upon the said close in which &c. in the said way there, and because the said fences and hedges in the said declaration mentioned, before the said several times when &c had been wrongfully erected, and were then standing in and across the said footway and obstructing the same, so that without breaking down, treading down, prostrating, damaging and destroying the said fences and hedges respectively, the defendant could not then go, pass and repass into, through, over and along the said close in which &c. in the said footway then as he ought to have done. The defendant at the said several times when &c. in the declaration mentioned, in order to remove the said obstruction, broke down, trod down, prostrated, damaged and destroyed the said fences and hedges respectively in the said declaration mentioned, doing no unnecessary damage to the plaintiff on those occasions, which are the same alleged trespasses whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

4. Private Ways.

Private way by *prescription* by a freeholder. (*s*)

Commencement as ante, 376, mutatis mutandis, *and then proceed as follows:*] And the defendant further saith, that he the defendant, long before and at the said several times when &c. was and still is seised in his demesne as of fee (*t*) of and in a certain close called ——, contiguous and next adjoining to the said close in which &c. and that the defendant and all those whose estate he now hath, and at the said several times when &c. had, of and in the said close called ——, *from time whereof the memory of man is not to the contrary*, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the defendant at the said times when &c. of right ought to have had and used, and still of right ought to have and use, a certain way (*u*) for himself and themselves, and his and their servants, farmers and tenants, occupiers (*x*) of the said close called ——, to pass and repass on foot, and with horses, mares, geldings, and other cattle, from a certain common queen's highway, in the parish of —— aforesaid, unto, into, through, over and along the said close of the plaintiff, called ——, in which &c. unto and into the said close now of the defendant, and so from thence back again unto, into, through and over and along the said close of the plaintiff called ——, in which &c. unto and into the said common queen's highway, at all times of the year, (*y*) at his and their free will and pleasure, as to the said close of the defendant, with the appurtenances belonging and appertaining. (*z*) And the defendant being so seised of his said close, and also being in the possession thereof, (*a*) and having occasion to use the said way, did, with his servants and horses, and mares and geldings, and cattle, at the said several times when &c. pass and repass in, by, through and along the said way, from the said common queen's high-

(*s*) See forms and law, Lutw. 1426, 1427, 1527; 16 East, 343; 2 Rich. C. P. 49, 52; Lil. Ent. 72; and *ante*, vol. ii. 617. How to plead it, 2 Tyr. 163; 2 Crom. & M. 329; and see form of plea of right of way under 2 & 3 W. 4, c. 71, ss. 2 & 5, 1 Mood. & Rob. 382; and see a plea by a rector, Willes, 283. As to the mode of pleading a private right of way in general, see Com. Dig. Chimin. D. 2, &c.; Vin. Abr. Chimin. Private, H.; Bac. Abr. Highways, C. The *termini* and *course* of a private way must be stated in pleading, *id. ibid.* But it is not necessary to describe all the closes intervening between the two *termini*, *Simpson* v. *Lewthwaite*, 3 Bar. & Adol. 226; 1 Hen. Bla. 351, 355; 1 East, 377. *Quære*, if the way can be described as leading "*towards*, &c." 1 East, 377; but *semble*, that where the way leads over other grounds of the defendant, the facts must be stated; *ante*, vol. ii. p. 618.

Where to trespass for breaking and entering the plaintiff's dwelling-house, the defendant pleaded that the house was in the parish of B., in which there was an immemorial custom for all the parishioners to go through the house upon their perambulations of the parish boundaries on the Thursday in Rogation Week, every third year, and justified under the custom; and issue being joined on a traverse of the custom, and a verdict found for the defendants, it was held, on motion for judgment *non obstante veredicto*, that it could not be assumed on this plea that the house stood on the boundary, and that the custom was therefore bad, as pleaded; *Taylor* v. *Devey*, 7 A. & E. 409; 2 N. & P. 409, S. C.

(*t*) As to the necessity of pleading in a *que* estate, and showing a seisin in fee, see 3 You. & Jerv. 93, and cases there cited; and *ante*, 372.

(*u*) Another plea was formerly added varying the statement of the right of way, if there were any doubt as to the precise nature of it.

(*x*) A landlord comes within the meaning of this word, though he only occupies by his tenant; 2 D. & R. 31; 1 B. & C. 8, S. C.; and see 16 East, 343.

(*y*) If the right of way be qualified as to the time of enjoyment or otherwise, it should be described accordingly; see 4 Campb. 190.

(*z*) The several forms in Lutw. 1426, 1427, and 119; Lil. Ent. 426; 1 B. & P. 371, contain this allegation; but see Yelv. 150; *ante*, vol. ii. 618; Lutw. 1527; Rast. Ent. 617 a, b, 618 a, b; Lil. Ent. 452; 1 East, 377; 1 Hen. Bla. 351.

(*a*) This, though not unusual, is said to be improper, when a seisin in fee is alleged, as in this form, possession being an intendment of law when a seisin is laid; 16 East, 343; 4 M. & S. 392.

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way, into, through, over and along the said close of the plaintiff called ——, in which &c. unto and into the said close now of the defendant, and so from thence back again, in, by, through and along the said way, unto and into the said common queen's highway, using the said way there for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid, and in so doing &c. [*Same as the form, ante*, 384, *from the* † *to the end, justifying the trespasses according to the facts, observing the introductory part of this plea.*

The like by a copyholder, for a private way in the same manor. (*b*)

Enumerate the trespasses, if necessary, as in the form, ante, 376, mutatis mutandis, *and then state that the* locus in quo *was parcel of the manor, and describe the customary tenement as ante*, 378, *and then state the customary right of way as follows:*] And the defendant further saith, that within the said manor there now is, and at the said times when &c. was, and from time whereof the memory of man is not to the contrary hath been, a certain ancient and laudable custom there used and approved of, (that is to say), that every customary tenant of the said customary tenement, with the appurtenances for the time being, from time whereof the memory of man is not to the contrary, hath had, and hath used and accustomed to have, and of right ought to have had, and still of right ought to have, for himself and his servants, a certain way to go, return, pass and repass on foot and with cattle and carriages, from and out of the said customary tenement, into, through and over the said close in which &c. unto and into a certain public road and queen's common highway, at ——, in the said parish of ——, and so from thence back again into the said customary tenement, with the appurtenances, every year, at all times of the year, when and as often as occasion hath required, as belonging and appertaining to such customary tenement. And the defendant further says, that long before any of the said times when &c. to wit, on &c. [*state the grant to the copyholder, and his entry, as ante*, 379, *and then proceed as follows:*] wherefore the defendant, at the said several times when &c. having occasion to use the same way, went, passed and repassed on foot and with cattle and carriages, from and out of the said customary tenement, into, through and over the said close, in which &c. by and along the said way there, using the same as he lawfully might for the cause aforesaid, and in so doing, &c. [*Same as the form, ante*, 384, *from the* † *to the end, justifying the trespasses according to the facts, and observing the introductory part of the plea.*

Prescriptive right of way in the old form, where defendant has closes at both ends of way. (*c*)

State a seisin in fee, as ante, 308.] And that he the said C. D. and all those whose estate he now hath, and at the said several times when &c. had, of and in the said messuage, farm and lands, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the said C. D. at

(*b*) See notes to the preceding form, and the form, 9 Wentw. 255; and as to the mode of pleading by a copyholder in general, see *ante*, vol. ii. Index, "*Copyhold Estate.*" A copyholder must prescribe under the lord of his manor for a way, &c. *out of the manor, ante*, vol. i. Index, "*Way.*" 1 Saund. 349, note 11; Com. Dig. Pleader, 3 K. 24; and see the forms, 2 Lutw. 1327; Co. Ent. 9; Winch. Ent. 971, 972; Lib. Plac. 373, 374.

(*c*) See 1 East, 377. This form is merely suggested as perhaps expedient to be resorted to where the defendant was seised of closes at each end of the way, and of course cannot prescribe for a way over such closes. In pleading a prescriptive private way it is not necessary to describe all the closes intervening between the two *termini*; *Simpson* v. *Lewthwaite*, 3 B. & Ad. 226.

the said several times when &c. of right ought to have had and used, and still of right ought to have and use, a certain way for himself and themselves, and his and their servants, farmers and tenants, occupiers of the said messuage, farm and lands, to pass and repass on foot from a certain close in the parish aforesaid, near to a certain common queen's highway, in the same parish, into, through, over and along the said closes, in which &c. towards the said messuage, farm and lands, now of the said C. D. and so back again, unto, into, through, over and along the said closes, in which &c. unto and into the said close in this first plea mentioned, towards the said common queen's highway, at all times of the year, at his and their free will and pleasure, as to the said messuage, farm and lands of the said C. D. with the appurtenances belonging and appertaining; and the said C. D. being so seised of the said messuage, farm and lands, and also being in the possession thereof, the said C. D. in his own right, and the said E. F. as his servant, and by his command, at the said several times when &c. did pass and repass on foot, in and by and along the said way from and out of the said close in this plea first mentioned, into, through, over and along the said close of the plaintiff, in which &c. towards the said messuage, farms and lands, now of the said C. D. and so from thence back again, in, by, through and along the said footway towards the said common queen's highway, using the said way there for the purpose and on the occasion aforesaid, as they lawfully might for the cause aforesaid, and in so doing &c. [*Same as the form, ante*, 384, *from the* † *to the end, justifying trespasses according to the fact.*

Plea of a private right of way under a prescription for twenty years, pleaded under 2 & 3 W. 4, c. 71. (*d*)

And for a further plea in this behalf, the defendants say, that long before and at the several times when &c. in the said declaration mentioned, the said W. S. was the occupier of a certain close with the appurtenances called H. B. situate in the parish of A. in the county aforesaid. And the defendants further say, that he the said W. S. and the respective occupiers for the time being of the said last-mentioned close, for and during the full period of twenty years next before the commencement of this suit, have and each of them hath actually had, used and enjoyed as of right (*e*) and without interruption, and each of them hath been accustomed to have and enjoy as of right and without interruption, a certain way for himself and themselves, and his and their servants, farmers and tenants, occupiers of the said last-mentioned close, to go, return, pass and repass on foot and with horses, mares, geldings and other cattle, and also with carts, waggons and other carriages from the said last-mentioned close, unto, into, through, over and along the said closes of the plaintiff, in which &c. and from thence unto and into a certain common queen's highway in the county aforesaid, and so from thence back again from the said highway, unto, into, through, over, and along the said closes of the plaintiff, in which &c. unto and into the said close in the occupation of the defendant at all times of the year, at his and their free will and pleasure, as to the said last-mentioned close belonging and appertaining; wherefore the said W. S. being such occupier of the said close called H. B., and having occasion to use the said way in his own right, and

(*d*) See in general, 1 Chitty's Gen. Prac. 285, 286; and see forms in *Payne* v. *Sheddon*, 1 Mood. & Rob. 382; *Jones* v. *Price*, 3 Bing. N. C. 52.

(*e*) See *ante*, 374, note (*q*).

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the said W. S. the younger, as the servant of the said W. S., and by his command in that behalf, at the said times when &c. with themselves and with the said horses, mares, geldings, bulls, cows, oxen, sheep, and other cattle in the said declaration mentioned, and also with the said carts, waggons and other carriages, went, passed, and repassed, in, by and along the said ways there from the said highways unto, into, through, over and along the said closes of the plaintiff, in which &c. unto and into the said close called H. B., and so from thence back again, unto, into, through, over and along the said closes of the plaintiff, in which &c. unto and into the said highway, using the said way there for the purpose and on the occasion aforesaid, as they lawfully might for the cause aforesaid, and in so doing, the defendants with their feet in walking necessarily and unavoidably a little trod down, trampled upon, crushed, consumed and spoiled the grass and herbage, plants, and corn of the plaintiff, then growing and being in the said closes, in which &c. respectively, and the said cattle, to wit, the said horses, mares, geldings, bulls, cows, oxen and sheep and other cattle at the said several times when &c. in passing and repassing in and along the said way, by snaps and morsels, and against the will of the defendants, eat up and depastured a little other of the grass, herbage, plants and corn of the plaintiff there then growing and being in the said way, and also in so going, passing and repassing, in, by and along the said way, the defendant with the said horses, mares, geldings, bulls, cows, oxen, sheep and other cattle, and also with the wheels of the said carts, waggons and other carriages, to a necessary and unavoidable degree, a little crushed, damaged and spoiled other the grass and corn of the plaintiff's, growing and being in the said way, and to a necessary and unavoidable degree a little tore up, turned up, subverted, damaged and spoiled the earth and soil of the said closes in which &c. in the said way there, and because the said gates in the said declaration mentioned, before the said several times when &c. had been wrongfully placed and erected and were then standing and being in and across the said way, and locked and fastened with the said locks, staples and hinges in the said declaration mentioned, and obstructing the said way, so that without a little forcing and breaking open, breaking to pieces, damaging and spoiling the said gates, locks, staples and hinges respectively the defendant could not then go, pass and repass with the said cattle, horses, mares, geldings, bulls, cows, sheep and other cattle, with the said carts, waggons and other carriages, into, through, over and along the said closes, in which &c. in the said way there, as they ought to have done, the said W. S. in his own right, and the said W. S. the younger, as the servant of the said W. S., and by his command in that behalf, at the said times when &c. in order to remove the said obstructions, did, to a little and necessary degree, force and break open, break to pieces, damage and spoil the said gates, locks, staples and hinges, as it was lawful for them to do for the cause aforesaid, doing no unnecessary damage to the plaintiffs on those occasions, which are the said several alleged trespasses in the said declaration mentioned, and whereof the plaintiff hath above complained against him. And this the defendants are ready to verify, &c.

Plea of twenty years uninterrupted right to carry minerals, &c. over *locus in quo*.

See the form in *Monmouthshire Canal Company* v. *Harford and others*, 5 Tyr. 72; and see *David* v. *Kingscote*, 6 M. & W. 174.

Modern form of plea of justification in trespass *under a right of common* under 2 & 3 W. 4, c. 71, s. 5. (*e*)

Commence as ante, 376.] As to the alleged trespasses in the said declaration mentioned, says, that before and at the said time when &c. he the defendant was and still is the occupier of a certain messuage and land with the appurtenances, situate in the parish of —— aforesaid, and that he the defendant and the occupier for the time being of the said messuage and land with the appurtenances, for thirty years next before the commencement of this suit, have and each of them hath continually had and enjoyed as of right, and have been used and accustomed to have and enjoy as of right, and the defendant still as of right ought to have and enjoy for himself and themselves, and his and their tenants, occupiers of the said messuage and land and appurtenances, common of pasture &c. [*As in the old precedents.*

Another form of justification in trespass by an occupier under a *right of common* of pasture under 2 & 3 W. 4, c. 71, s. 5. (*f*)

Commence as ante, 376.] As to all the alleged trespasses in the said declaration mentioned, except [*here state the trespasses intended to be justified*] the defendant says, that he is not guilty thereof in manner and form as the plaintiff has above thereof complained against him. And of this he puts himself upon the country, &c. And as to the residue of the said alleged trespasses in the said declaration mentioned, the defendant says, that before and at the said time when &c. he the defendant was and still is the occupier of a certain messuage and land, with the appurtenances, situate and being in the parish of —— aforesaid, and that he the defendant and the occupier for the time being of the said messuage and land, with the appurtenances, for thirty years next before the commencement of this suit, have and each of them hath continually had and enjoyed as of right, and have been used and accustomed to have and enjoy as of right, and the defendant still of right ought to have, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture (*g*) in, upon and throughout the said place, in which &c. called —— for all his and their commonable cattle, levant and couchant, in and upon the said messuage and land, with the appurtenances, every year, at all times of the year, as to the said messuage and land with the appurtenances belonging and appertaining; wherefore he the defendant, at the said time when &c. entered into the said close, in which &c. in order to turn and put, and did then turn and put into and upon the same, the said horses, mares, geldings, cows, oxen and sheep in the said declaration mentioned, being the defendant's own commonable cattle, levant and couchant, in and upon the said last-mentioned land, with the appurtenances, to use the said common of pasture of the defendant there, and in so doing, he the defendant, at the said times when &c. with feet in walking necessarily and unavoidably trod down, trampled upon, spoiled, consumed and

(*e*) Under stat. 2 & 3 W. 4, c. 71, s. 1, proof of a thirty years enjoyment of common of pasture is not complete if proof be given of an enjoyment for twenty-eight years immediately preceding an action in which the right is disputed, and it appear that twenty-eight years back the enjoyment was obstructed, but that the right was exercised before the obstruction; *Bailey* v. *Appleyard*, 8 A. & E. 161; 3 N. & P. 257, S. C. Where a right of common had been exercised by the tenants of a farm for more than thirty years before action, except for about two years in the middle of the period, when the landlord was in possession, who had no commonable cattle, it was held that such non-user was not an interruption within 2 & 3 Will. 4, c. 71; *Carr* v. *Foster*, 2 G. & D. 753.

(*f*) See a form in Peteradorff's Prec. 140, and 2 Hodg. 127.

(*g*) This plea must show for what purpose the right is claimed, and a prescription for a right every year and at all times of the year to put and turn the party's cattle into and upon a certain close, is too vague, and may be demurred to; *Bailey* v. *Appleyard*, 8 A. & E. 161; 3 N. & P. 257, S. C.

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destroyed a little of the grass and hay, herbs, roots, shrubs and bushes there growing and being, and with the said horses, mares, geldings, cows, oxen and sheep in the said declaration mentioned necessarily and unavoidably trod down, trampled upon, spoiled, eat up, depastured, consumed and destroyed a little other of the grass and hay, herbs, roots, shrubs and bushes there also growing and being, and because the said close in which &c. before and at the said time when &c. had been and was wrongfully inclosed with and by means of the said ditches and fences and gates in the said first count of the said declaration mentioned, before then wrongfully dug and made, and put and placed in and upon the said close in which &c. so that without filling up and levelling the said ditches and fences, and removing the said gates, the defendant could not use or enjoy his said common of pasture in, upon and throughout the said close, in which &c. in so ample and beneficial a manner as he otherwise might and would and ought to have done, he the defendant, at the said several times when &c. with the said pickaxes, hatchets, saws and mattock, and other instruments in the said declaration mentioned, filled up and levelled the said ditches, and dug up, threw down and prostrated the said fences and gates in the said first count mentioned, and took and carried the said gates to a small and convenient distance, where they left the same for the use of the plaintiff, doing no unnecessary damage to the plaintiff on the occasions aforesaid, and as he lawfully might for the cause aforesaid, which are the said several alleged trespasses in the introductory part of this plea mentioned, whereof the plaintiff has above complained against the defendant. And this the defendant is ready to verify, &c.

Defendant seised in fee of a messuage, and had right of common of pasture over a common, by virtue of an award under Inclosure Act. (*h*)

And for a further plea in this behalf, the defendant says, that before and at the time when &c. the defendant was and still is seised in his demesne as of fee of and in a certain messuage, being one of the commonable messuages referred to in the act set out in the preceding plea, and that before and at the time of making that act the owner and proprietor of the said messuage for the time being *had a certain right of common of pasture in*, upon and throughout a certain common, situate within the said parish of G. called the West Common, mentioned in the said act, that the plaintiffs are the successors of the bailiffs, assistants &c. mentioned in the act, that the commissioners, on the 23d of June, 1809, made and executed their award concerning the division and inclosure aforesaid, and did thereby "allot and award common of pasture to be used, stocked and enjoyed by the owners and proprietors of commonable messuages or cottages, and their respective tenants and occupiers of the said messuages and cottages only having right of common upon the said common in G. aforesaid, known by the name of West Common, the plot of land or ground there mentioned, that is to say, West Common allotment, unto and for the owners and occupiers of commonable messuages or cottages and toftsteads, and their respective tenants or occupiers of the said messuages and cottages and toftsteads, having right

(*h*) See the form in the *Bailiffs of Godmanchester* v. *Phillips*, 5 B. & Adol. 198. See plea of public road and right of way over *locus in quo*, and that under an inclosure act the soil and herbage of such roads were vested in the defendants as overseers of the parish, *Brownlow* v. *Tomlinson*, 1 M. & G. 484.

of common upon the West Common in G. aforesaid, one plot of land containing 171 acres, bounded &c.," and the said award gave directions [*stated in the plea*] as to the time of turning on cattle, and the number and kind to be turned on by the owners and occupiers, according to the list contained in a schedule to the award &c. [The plea then stated, that the plot of ground before mentioned, being the *locus in quo*, was part of the said West Common, that the defendant's messuage in that plea mentioned was inserted in the said schedule as one of those in respect of which the owner or occupier might use, stock and enjoy the said plot of ground, being the close in which &c. as directed by their award, and that by virtue of the act of parliament and of the award, the defendant being seised and the occupier of the said messuage as aforesaid, at the times when &c. had and still of right ought to have a right of common of pasture in and over the close in which &c., that is to say, a right to stock the same with two cows, on &c. until &c. as to the said messuage, with the appurtenances belonging, and being so seised, he on &c. (within the limited time) entered &c. to turn on, and did turn on two cows, being his own cattle &c. to pasture and use the common, &c.

Right of way by non-existing grant. (*i*)

And for a further plea in this behalf, [as to the said several alleged trespasses in the introductory part of the said second plea mentioned and therein justified,] the defendant says, that he the defendant, long before and at the said several times when &c. was, and from thence hitherto hath been, and still is seised in his demesne as of fee, of and in a certain [close] situate and being in the parish of —— aforesaid. And the defendant further saith, that long before any of the said several times when &c., to wit, on &c. (*k*) by a certain deed made between I. K. (*l*) the then owner of the said [close] in which &c., and who was then seised thereof in his demesne as of fee, and L. M. who was then seised in his demesne as of fee of the said [close] now of the defendant, and whose estate therein he the defendant now hath, but which deed hath since been lost and destroyed by accident, and therefore cannot be brought into the said Court here, and the date whereof is for that reason wholly unknown to the defendant, the said I. K. so then being owner of the said [close] in which &c., did grant to the said L. M. so then being the owner of the said [close] now of the defendant, and to the heirs and assigns of the said L. M. a certain way from [*describe the way, which may be thus:*] a certain public queen's highway in the parish aforesaid, into, through,

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(*i*) See a form, 3 Bing. 115, and *Plant* v. *James*, 5 Bar. & Adol. 791. Of right of way by *grant*, where there has been an *actual* grant of a way by a will, lease, conveyance, or other deed, the plea must be framed accordingly; see 1 B. & P. 371; 3 East, 294; 1 T. R. 561. See form of plea of a grant by a will, 1 B. & P. 371. In the case of an *express* grant, insert two pleas or more, one claiming the right of way by *express* grant in *express* terms, and another by a grant "of all ways therewith used &c.," averring that a particular way was used. When there was any reason to apprehend that a prescriptive right of way had been extinguished by unity of seisin, it must then, before the 2 & 3 W. 4, c. 71, s. 5, have been claimed as a way by non-existing grant as in the above form, and the uninterrupted use of the way for a long time was and still is evidence from which the jury may presume a grant; 3 T. R. 157; 1 Saund. 323 a; 3 East, 294; 1 East, 381; 10 East, 55. In 10 East, 55, it was decided that the names of the parties to the supposed grant must be stated. See as to the evidence in a plea of right of way by non-existing grant, 3 Bing. 115.

(*k*) Some day about the time when it can be proved the user of the way first took place, and whilst the estates were in possession of some person seised in fee or his tenant.

(*l*) The names of the parties must be stated; 10 East, 55.

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The like in another form. (*o*)

Commencement as ante, 376.] That at the said several times when &c. he the defendant was and still is seised in his demesne as of fee of and in a certain messuage, and divers, to wit, seventy acres of land with the appurtenances, situate and being in the parish of &c. aforesaid. And the defendant further saith, that long before the said times when &c. and at the time of the making the grant hereinafter mentioned, one J. P. was seised in his demesne as of fee of and in the said closes in which &c., and one P. H. was seised in his demesne as of fee of and in the said messuage and land with the appurtenances; and the said J. P. and P. H., being so respectively seised, heretofore, and long before the said several times when &c. to wit on &c., by a certain deed then made between him the said J. P. of the one part, and the said P. H. of the other part, which said deed hath since been lost and destroyed by accident, and therefore cannot be brought into Court here, and the date whereof for that reason is wholly unknown to the defendant, the said J. P., so being the owner of the said closes in which &c. did grant to the said P. H. so then being owner of the said messuage and land with the appurtenances, and to his heirs and assigns, a certain way for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage and land with the appurtenances for the time being, and for his and their workmen, into, through, over and across the said closes in which &c. a certain way towards a certain common and public queen's highway in the parish aforesaid in the county aforesaid, and so back again into, through, over and across the said closes in which &c. in the said way there, towards the said messuage and lands with the appurtenances, to go, return, pass

(*m*) See the notes, *ante*, 387.
(*n*) *Quære* if the derivative title ought not to be stated?
(*o*) See notes to the form, *ante*, 393.

and repass, on foot and on horseback, and with their cattle, carts and other carriages, every year, and at all times of the year, for the convenient and necessary use, occupation and enjoyment of the said messuage and lands with the appurtenances; by virtue of which said grant, he the defendant, having the estate of the said P. H. of and in the said messuage and land with the appurtenances, and being seised thereof in his demesne as of fee, and so being in the occupation thereof, and having occasion to use the said way for the convenient and necessary use, occupation and enjoyment thereof, at the said several times when &c. entered into the said closes in the said declaration mentioned, and with horses, mares, geldings and other cattle, and with carts, waggons and other carriages, passed and repassed from the said messuage and land with the appurtenances, into, through and across the said closes in which &c. in the said way there, towards the said common and public queen's highway, and back again in the said way into, through and across the said closes in which &c. towards the said messuage and land with the appurtenances, as it was lawful for him to do for the causes aforesaid, and in so doing &c. [*same as in the form, ante, 384, from the* † *to the end*, mutatis mutandis.

Right of way of necessity. (*p*)

And for a further plea in this behalf, as to the &c. [*enumerating the trespasses intended to be justified, if necessary*], the defendant says, that he the defendant, before and at the said several times when &c. was and still is seised in his demesne as of fee of and in a certain close called ——, contiguous and next adjoining to the said close in which &c., and that one E. F. whose estate in the said close called —— the defendant now hath, before and at the time of the making of the alienation and conveyance hereinafter mentioned, was seised in his demesne as of fee as well of and in the said close in which &c. as of the said other close now of the defendant, with their respective appurtenances; and the said E. F. being so seised of the said closes respectively, long before any of the said several times when &c., to wit, on &c., A. D. ——, duly granted, aliened and conveyed (*q*) the said close in which &c. to a certain other person, to wit, to G. H. and to the heirs and assigns of the said G. H.; by means whereof the said G. H. then became and was seised in his demesne as of fee of and in the said close in which &c.; and the defendant further saith, that at the time of the said alienation and conveyance of the said close in which &c. the said E. F. who was so seised thereof, and so aliened and conveyed the same as aforesaid, not having any other way to the said close now of the defendant, otherwise than from and out of a certain public highway in the county aforesaid, into, through, over and along the said close in which &c. by reason thereof the said E. F. who so aliened and conveyed the said close in which &c. as aforesaid, after such alienation and conveyance, necessarily whilst he continued

Defendant seised of adjoining close.

E. F. formerly seised thereof and of *locus in quo*.

E. F. aliens *locus in quo* to G. H.

E. F. having no other way to the other close than over *locus in quo*, of right had such way.

(*p*) See the forms, Lutw. 1487; 9 Wentw. 101, 102, &c.; 8 T. R. 50; 5 Taunt. 311; and as to the law and use of this plea, 5 Taunt. 311; 4 M. & S. 387; 3 Taunt. 31; 1 Saund. 323 a, b, note 6; 8 T. R. 50; Cro. Jac. 170; 1 B. & P. 374, n. (*a*); Willes, 71. As to the form, see 10 East, 57. A way of necessity is not extinguished by unity of seisin, 1 Saund. 323 a; a way of necessity is limited by the necessity which created it, and ceases if there be another way; 2 Bing. 76. See form of replication to this plea, *id.*

(*q*) *Quære* if the conveyance deed, &c. as well as the parties thereto, ought not to be stated, and if no such deed can be discovered, then a deed between persons who were the original owners should be feigned, and a plea of non-existing grant of a way added. See 10 East, 56; 4 M. & S. 387; 5 Taunt. 311.

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seised of the said close now of the defendant, ought to have had, and of right had, and the defendant, so having the estate of the said E. F. as aforesaid, before and at the said several times when &c. necessarily had, and of right ought to have had, and still of right ought to have, a convenient way to the said close now of the defendant, from the said highway, into, through, over and along the said close in which &c. and that the said E. F. who so aliened and conveyed the said close in which &c. and all the occupiers of the said close, now of the defendant, after the said alienation and conveyance of the said close in which &c. had and were accustomed to have, and of right ought to have had, and the defendant still of right ought to have, a certain necessary way for themselves and their servants on foot, and with horses, mares and geldings, carts and carriages, from the said highway, into, through, over and along the said close in which &c. unto and into the said close now of the defendant, to go and return, pass and repass, in every year, at all times of the year, for the necessary use and occupation of the said close now of the defendant, the same way being the nearest and most convenient way over the said close in which &c. to the said close now of the defendant. Wherefore at the said several times when &c. the defendant being so seised as aforesaid, and having occasion to use the said way, did, with his servants and with his horses, mares and geldings, carts and carriages, at the said several times when &c. pass and repass in, by, through and along the said way, from the said common queen's highway, into, through, over and along the said close of the plaintiff in which &c. unto and into the said close now of the defendant, and from thence back again, in, by, through and along the said way, unto and into the said common queen's highway, using the said way there for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid. And in so doing, &c. [*same as in the form, ante, 384, from the † to the end, justifying the trespass according to the facts, observing the introductory part of the plea.*

And since the alienation E. F. &c. were entitled to the necessary way.

Wherefore defendant entered, &c.

Private way by a *tenant* under a lease, or from year to year, in either of the above cases.

See the forms, Rast. Ent. 618 a, b; Lutw. 1427. The plea stating the possessory right will resemble that claiming a right of common by a tenant, as pointed out, *ante*, 376. The lease for years, or the demise from year to year, and the entry of the lessee, are to be stated as *ante*, 363; 16 East, 346; 4 Maule & Selw. 392; 2 Rich. C. P. 424; and where the defendant claims under a freeholder by prescription, are to be inserted in the form, *ante*, 387, immediately after the statement of the right of common; and if under a copyholder, immediately after the statement of the grant of the customary tenement and the copyholder's entry, *ante*, 388.

A private right of way under a local inclosure act, and award. (r)

Enumerating the trespasses, if necessary.] Saith, before the said several

(r) See the case in 5 B. & C. 513; 8 D. & R. 299, S. C., wherein the above forms of pleas, amongst others, were adopted; see *Phillips* v. *Maile*, 7 Bing. 133; 4 M. & P. 770, S. C. See also *Johnson* v. *Hodgson*, 8 East, 38. Where defendant justified breaking and entering plaintiff's close (which was set out by abuttals) alleging that the said close in which &c. was part of an allotment of six acres, made by commissioners duly authorised for certain purposes, in execution of which he entered; to which plaintiff replied, denying that the said close in which &c. was part of the six acres, in the plea supposed to have been allotted; whereupon issue was joined; and it appeared that the close set out by abuttals was not all within the allotment, but that the part in which the actual trespass occurred was within it: it was held, that the justification was sufficient; *Basset* v. *Mitchell*, 2 Bar. & Adol. 99; *aliter*, where several distinct closes, some only of which are not

times when &c. and before and at the time of the making and passing of the act of parliament and making the award hereinafter next mentioned, there was and of right ought to have been a certain common and public highway from and out of a certain public highway called [P. H.] towards and into, through, over and along the said closes in which &c. towards and into a certain other highway, for all the liege subjects of our lady the queen to go, return, pass and repass on foot at all times of the year at their free will and pleasure; and the defendant further saith, that heretofore, to wit, on &c. [*the day of passing the act*] a certain act of parliament was made and passed, intituled, "An Act, &c." [*state the title of the act*]; and that afterwards, and after the making and passing of the said act of parliament, to wit, on &c. [*date of award*] P. H. Esq. [*names of commissioners*] then being the commissioners for carrying the said act of parliament into execution, and for effecting the purposes of the said act, duly made, executed and published their award in writing, under and in pursuance of the said act of parliament, and thereby (amongst other things) awarded that [*here state the award of the way, which in the case under which this plea was framed was thus:*] a footway, beginning at the gate entering the farmyard of M. B. and extending eastwardly over the allotments awarded to the said M. B. and R. C. and others respectively, into the E. F. road, should be set out, and was by the said award set out, for the use only of the proprietor of B. farmhouse, belonging to the said T. B. [meaning the now defendant.] And the defendant further saith, that the said footway so set out by the said award as aforesaid was and is a footway into, through, over and along the said closes in which &c. in the same line and direction with the public and common footway hereinbefore mentioned. And the defendant further saith, that he the defendant, before and at the said several times when &c. was and is lawfully seised in his demesne as of fee of and in, and was and is the proprietor and occupier of the said B. farmhouse, wherefore the defendant, having occasion to use the said last-mentioned footway so awarded as aforesaid, did, at the said several times when &c. pass and repass in, by, through and along the said footway, into, through, over and along the said closes in which &c. using the said way for the purpose aforesaid, and on the occasion aforesaid, as he lawfully might for the cause aforesaid; and in so doing, he the defendant, with his feet in walking unavoidably a little damaged and spoiled the earth and soil then being in the said closes in which &c. and because the said gates, locks, staples and hinges in the said declaration mentioned, before the said several times when &c. had been and were wrongfully erected, and were then standing and being across the said footway and obstructing the same, so that without forcing, breaking open, breaking to pieces, damaging

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by the justification, —— v. ——, Exchequer, Hil. T. 1836.

In pleading a *prescriptive right* of way, it is not necessary to describe all the closes intervening between the two *termini*, and therefore where to trespass for breaking and entering the plaintiff's closes, the defendant pleaded, "that he was seised in fee of land *next adjoining* to one of the said closes in which &c.," and then claimed in respect of the said land a way from the said land unto and into, through, over and along the said closes in which &c, and unto and into a certain common king's highway, and at the trial the defendant proved a prescriptive right of way from his land into and *over the land of third persons*, and *thence into and over the plaintiff's closes, and* thence into a common highway, it was held that the plea was sufficiently proved, and this, though it appeared that part of the defendant's land did adjoin to one of the plaintiff's closes, and that by permission of the latter the defendant had sometimes used a way from that part of his land over the plaintiff's adjoining close, as well as the way to which the plea was meant to refer; *Simpson* v. *Lewthwaite*, 3 Bar. & Adol. 226.

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The like in another form.

And for a further plea in this behalf, the defendant says, that before the said several times when &c., and before and at the time of the making and passing of the act of parliament hereinafter mentioned, and at the time of making the award hereinafter mentioned, the defendant was and from thence hitherto hath been and still is seised in his demesne as of fee of and in a certain messuage called B. Farm-house, in the county aforesaid, near to the said closes in which &c., and that he the defendant, and all those whose estate he now hath, and at the said time of the making of the said act of parliament and award had, of and in the said messuage called B. Farm-house, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, a certain way for himself and themselves, and his and their servants, farmers and tenants, occupiers of the same messuage, to pass and repass on foot from a certain common queen's highway called P. H. Road, in the parish of E. aforesaid, unto, into, through, over and along the said closes of the plaintiff, in which &c. towards a certain other public highway at the said parish of E. and so from thence back again unto, into, through, over and along the said closes in which &c. towards and unto and into the said common queen's highway called P. H. Road, at all times of the year, at his and their free will and pleasure, as to the said messuage of the defendant belonging and appertaining. And the defendant further saith, that heretofore, to wit, on &c. [*day of passing the act,*] a certain act of parliament was made and passed, intituled, "An Act &c." [*state the title,*] and that afterwards, and after the making and passing of the said act of parliament, to wit, on &c. [*date of award,*] P. H. Esq. [*the commissioners who made the award,*] then being commissioners for carrying the said act of parliament into execution, and for effecting the purposes of the said act of parliament, duly made, executed and published their award in writing, under and in pursuance of the said act of parliament, and thereby [amongst other things] awarded that one other footway, beginning at the gate entering the farm-yard of M. B., and extending eastwardly over the allotments awarded to the said M. B. and R. C. and others respectively, into the E. F. Road, should be set out, and the same was by the said award set out for the use only of the proprietor or occupier of B. Farm-house, belonging to T. B. (meaning the now defendant.) And the defendant further saith, that the said footway so set out by the said award as aforesaid was and is a footway into, through, over and along the said closes in which &c. in the same line and direction as the said last-mentioned footway to which the defendant was so entitled as aforesaid at the time of making the said last mentioned award.

And the defendant further saith, that he the defendant before and at the said several times when &c. was and is the proprietor and occupier of the said messuage called B. Farm-house, with the appurtenances, wherefore the defendant having occasion to use the said last mentioned footway, did at the said several times when &c. [*Conclude as in the preceding form.*

Plea justifying entry into a close and well under a prescriptive right to take water from the well for the use of a messuage, whereof defendant was seised.

And for a further plea [as to the breaking and entering the said close in the said declaration mentioned, and with the said iron instruments tearing up, breaking to pieces, damaging and spoiling the said boards and planks, and as to casting and throwing a small part of the said wood, bricks, stones, and rubbish into the said well in the said declaration mentioned,] the defendant says, that he the defendant long before and at the said several times when &c. was and is seised in his demesne as of fee of and in a certain messuage with the appurtenances in the said parish aforesaid, near to the said close and well in which &c., and that he the defendant, and all those whose estate he now hath, and at the said several times when &c. had, of and in the said messuage with the appurtenances, from time whereof the memory of man is not to the contray, have had and used, and have been accustomed to have and take, and of right ought to have had and taken, and the defendant still of right ought to have and take water from the said well in the said first and last counts mentioned, and carry the same from thence to the said messuage with the appurtenances, to be used and consumed therein at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage, with the appurtenances; wherefore he the defendant, at the said several times when &c. having occasion for water to be used and consumed in the said last-mentioned messuage, at the said several times when &c. entered the said close in which &c. in order to take and carry away such water as last aforesaid from the said well to the said messuage, to be used and consumed therein; and because at the said time when &c. the said well was covered and wrongfully closed and shut with the said boards and planks, so that the defendant could not otherwise get water from the said well, he the defendant, in order to open the said well and get water therefrom, at the said time when &c. did necessarily with the said iron instruments tear up and a little break to pieces, damage and spoil the said boards and planks, and in so doing did unavoidably throw a part of the materials thereof coming into the said well, and in so doing did unavoidably cast and throw a small part of the said wood, bricks, stones and rubbish into the said well, doing no unnecessary damage to the plaintiff on those occasions, and as he lawfully might for the cause aforesaid, which are the said several alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above thereof complained against him the defendant. And this the defendant is ready to verify, &c.

5. ENTRY FOR TITHES.

Justification, entry on land to take *tithe*. (*t*)

And for a further plea in this behalf, [as to (*s*) the breaking and entering

(*s*) This enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

(*t*) See the forms, 9 Wentw. Index, lxxxvi.; 10 Co. 88 a, 91 a, and Com Dig. Pleader, 3 M. 40. A rector may enter a close to carry away tithes over the usual way by which the

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and spoiling the same, the defendant could not then pass and repass, into, through, over and along the said closes in which &c. in the said footpath there, as he ought to have done, the defendant, at the said several times when &c., in order to remove the said obstruction, forced, broke open, broke to pieces, damaged and spoiled the said gates, locks, staples and hinges in the said declaration mentioned, and took and carried the said gates, locks, staples and hinges to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage to the plaintiff on those occasions, which are the same alleged trespasses whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify, &c.

The like in another form.

And for a further plea in this behalf, the defendant says, that before the said several times when &c., and before and at the time of the making and passing of the act of parliament hereinafter mentioned, and at the time of making the award hereinafter mentioned, the defendant was and from thence hitherto hath been and still is seised in his demesne as of fee of and in a certain messuage called B. Farm-house, in the county aforesaid, near to the said closes in which &c., and that he the defendant, and all those whose estate he now hath, and at the said time of the making of the said act of parliament and award had, of and in the said messuage called B. Farm-house, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, a certain way for himself and themselves, and his and their servants, farmers and tenants, occupiers of the same messuage, to pass and repass on foot from a certain common queen's highway called P. H. Road, in the parish of E. aforesaid, unto, into, through, over and along the said closes of the plaintiff, in which &c. towards a certain other public highway at the said parish of E. and so from thence back again unto, into, through, over and along the said closes in which &c. towards and unto and into the said common queen's highway called P. H. Road, at all times of the year, at his and their free will and pleasure, as to the said messuage of the defendant belonging and appertaining. And the defendant further saith, that heretofore, to wit, on &c. [*day of passing the act,*] a certain act of parliament was made and passed, intituled, "An Act &c." [*state the title,*] and that afterwards, and after the making and passing of the said act of parliament, to wit, on &c. [*date of award,*] P. H. Esq. [*the commissioners who made the award,*] then being commissioners for carrying the said act of parliament into execution, and for effecting the purposes of the said act of parliament, duly made, executed and published their award in writing, under and in pursuance of the said act of parliament, and thereby [amongst other things] awarded that one other footway, beginning at the gate entering the farm-yard of M. B., and extending eastwardly over the allotments awarded to the said M. B. and R. C. and others respectively, into the E. F. Road, should be set out, and the same was by the said award set out for the use only of the proprietor or occupier of B. Farm-house, belonging to T. B. (meaning the now defendant.) And the defendant further saith, that the said footway so set out by the said award as aforesaid was and is a footway into, through, over and along the said closes in which &c. in the same line and direction as the said last-mentioned footway to which the defendant was so entitled as aforesaid at the time of making the said last mentioned award.

And the defendant further saith, that he the defendant before and at the said several times when &c. was and is the proprietor and occupier of the said messuage called B. Farm-house, with the appurtenances, wherefore the defendant having occasion to use the said last mentioned footway, did at the said several times when &c. [*Conclude as in the preceding form.*

Plea justifying entry into a close and well under a prescriptive right to take water from the well for the use of a messuage, whereof defendant was seised.

And for a further plea [as to the breaking and entering the said close in the said declaration mentioned, and with the said iron instruments tearing up, breaking to pieces, damaging and spoiling the said boards and planks, and as to casting and throwing a small part of the said wood, bricks, stones, and rubbish into the said well in the said declaration mentioned,] the defendant says, that he the defendant long before and at the said several times when &c. was and is seised in his demesne as of fee of and in a certain messuage with the appurtenances in the said parish aforesaid, near to the said close and well in which &c., and that he the defendant, and all those whose estate he now hath, and at the said several times when &c. had, of and in the said messuage with the appurtenances, from time whereof the memory of man is not to the contray, have had and used, and have been accustomed to have and take, and of right ought to have had and taken, and the defendant still of right ought to have and take water from the said well in the said first and last counts mentioned, and carry the same from thence to the said messuage with the appurtenances, to be used and consumed therein at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage, with the appurtenances; wherefore he the defendant, at the said several times when &c. having occasion for water to be used and consumed in the said last-mentioned messuage, at the said several times when &c. entered the said close in which &c. in order to take and carry away such water as last aforesaid from the said well to the said messuage, to be used and consumed therein; and because at the said time when &c. the said well was covered and wrongfully closed and shut with the said boards and planks, so that the defendant could not otherwise get water from the said well, he the defendant, in order to open the said well and get water therefrom, at the said time when &c. did necessarily with the said iron instruments tear up and a little break to pieces, damage and spoil the said boards and planks, and in so doing did unavoidably throw a part of the materials thereof coming into the said well, and in so doing did unavoidably cast and throw a small part of the said wood, bricks, stones and rubbish into the said well, doing no unnecessary damage to the plaintiff on those occasions, and as he lawfully might for the cause aforesaid, which are the said several alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above thereof complained against him the defendant. And this the defendant is ready to verify, &c.

5. ENTRY FOR TITHES.

Justification, entry on land to take *tithe*. (*t*)

And for a further plea in this behalf, [as to (*s*) the breaking and entering

(*s*) This enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

(*t*) See the forms, 9 Wentw. Index, lxxxvi.; 10 Co. 88 a, 91 a, and Com Dig. Pleader, 3 M. 40. A rector may enter a close to carry away tithes over the usual way by which the

ENTRY FOR TITHES.

the said close in the said declaration mentioned, and with feet in walking treading down, trampling upon, consuming and spoiling the grass and corn of the plaintiff then there growing, and with the wheels of the said carts, waggons, and other carriages, and with the feet of the said cattle drawing the same treading down, trampling upon, consuming and destroying other the grass and corn of the plaintiff, there standing and being in shocks and sheaves, and the said quantities of corn in the said close taking and carrying away, and converting and disposing thereof to their own use, above alleged to have been done by the said C. D. and E. F.] they the said C. D. and E. F. say, that the plaintiff ought not to maintain his aforesaid action thereof against them, because they say that the said C. D. long before and at the the said first time when &c. was, and from thence hitherto hath been and still is, rector of the rectory of the parish church of ——, in the said county of ——, and that the said close in the said declaration mentioned, called ——, in which &c. at the said several times when &c. in the said declaration mentioned, was situate and being in the parish of —— aforesaid, and within the bounds, limits, and titheable places of the same parish, and that all and singular the tithes of corn and grain yearly arising, growing, renewing and happening, in, upon and from the said close, in which &c. within forty years next before and at the time of the making of a certain act of parliament passed in the reign of Edward the Sixth, formerly King of England, and from time whereof the memory of man is not to the contrary, of right ought to have been, and still of right ought to be, set out, yielded and paid in kind, to the rector of the said rectory for the time being.(*u*) And the said C. D. and E. F. further say, that divers quantities of [wheat, oats and barley,] in the year of our Lord —— aforesaid, grew and arose in the said close, in which &c., and that before any of the said times when &c. in the said declaration mentioned, to wit, on &c. in the year last aforesaid, the said last mentioned [wheat, oats and barley,] were cut down, and the tenth part thereof duly severed from the residue thereof, and set out as and for the tithe of the said last mentioned [wheat, oats and barley,] according to immemorial usage and custom within the said parish, and were at the said times when &c. in the said close, for the use of him the said C. D. as such rector as aforesaid, whereupon the said C. D. as such rector as aforesaid, and the said E. F. as his servant, and by his command, afterwards, to wit, at the said first time when &c. in the said declaration mentioned, the same being respectively within a reasonable time after the cutting down of the said [wheat, oats and barley,] entered the said close in which &c. with the said carts,(*x*) waggons and other carriages in the said declaration mentioned, drawn with the said cattle therein also mentioned, in, by, through and along the usual way and entrance into the said close, in which &c. and

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other nine parts are carried away; 2 New Rep. 466. But see *James* v. *Dods*, 2 Crom. & Mees. 266; 4 Tyrw. 101, S. C., *contrà*, that he must use the ancient tithe way, and not a more convenient way adopted for the convenience of the occupier or the farm. As to the replication, see Cro. Jac. 224, Yelv. 157, and Com. Dig. Pleader, F. 18, 19. As to the effect under Lord Tenterden's Act (2 & 3 Will. 4, c. 100,) of the mere non-payment of tithes, and not withheld on any ground of exemption existing before the passing of that act, see *Fellowes* v. *Clay*, 3 G. & D. 407.

(*u*) See the notes, *ante*, vol. ii. 593, 621.

(*x*) This averment must depend on the averments in the declaration; it would in general suffice to say, "committed the said several alleged trespasses in the introductory part of this plea and in the said declaration mentioned."

Entry for Tithes.

to take, fetch and carry away the said tithes, the same being the said corn in the said declaration mentioned, and therein alleged to have been taken and carried away by the said C. D. and E. F., and the same having been so severed and set out as aforesaid, and did then, within a reasonable time for that purpose, take and carry away the same out of the said close, in which &c. in the said waggons, carts and other carriages, and converted and disposed thereof to their own use, and in so doing he the said C. D. and the said E. F. as his servant as aforesaid, did at those respective times with their feet in walking necessarily and unavoidably tread down, trample upon, consume and spoil a little of the grass and corn of the plaintiff growing and being in the said close, and with the wheels of the said carts, waggons and other carriages, and with the feet of the said cattle drawing the same, did necessarily and unavoidably tread down, trample upon, consume and spoil a little of the grass and corn of the plaintiff there growing, and the said cattle drawing the said carriages, while the said tithes were so being taken, fetched and carried away as aforesaid, by snaps (*y*) and morsels, and against the will of the said C. D. and E. F. eat up, consumed and destroyed a little of the corn of the plaintiff in the said close, in shocks and sheaves, the said C. D. and E. F. doing no unnecessary damage to the plaintiff on the occasion aforesaid, which are the same alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above complained against the said C. D. and E. F. And this the defendants are ready to verify, &c.

Plea justifying seizure under warrant for parochial rates.

Barrett v. *Nicholson*, 6 Car. & P. 292; and see form in *Bridges* v. *Blanchard*, 3 Nev. & Man. 691; *Crease* v. *Sawle*, 2 G. & D. 812; and see *Tracey* v. *Taylor*, 3 G. & D. 14; *Penny* v. *Slade*, 5 M. & W. 319.

Entry to re-take Property detained by Plaintiff.

6. Entry to re-take Property detained by Plaintiff.

Plea, justifying entering plaintiff's close, and taking away gelding, that plaintiff had forcibly taken it away from defendant. (*z*)

And for a further plea, as to the breaking and entering the said close in which &c. and treading and trampling upon the said grass and taking, seizing and leading away the said gelding, the defendants say, that the said C. D. long before the said time when &c. to wit, on &c. was possessed of the said gelding as of his own proper gelding, and the said C. D. being so possessed thereof, the plaintiff did then with force and arms take the said gelding from the said C. D. and put him into the said close, and wrongfully detained him therein until the said time when &c. wherefore the said C. D. in his own right, and the said E. F. as the servant of the said C. D. and by his command, at the said time when &c. broke and entered the said close in which &c. in order to retake the said gelding and did retake the said gelding and carry him away, as he lawfully might for the cause aforesaid, which &c. And this the defendants are ready to verify, &c.

(*y*) See *ante*, 384, n. (*p*).

(*z*) As to a right of entry for this purpose, see 3 Bla. Com. 4; Com. Dig. Pleader, 3 M. 39; 8 T. R. 78; 2 Roll. Rep. 55, 208; 2 Roll. Ab. 565; 3 M. & W. 485. As to plea of reception upon a rescue of goods distrained for rent, see *Rich* v. *Woolley*, 7 Bing. 651; 5 M. & P. 663, S. C. A plea professing to justify an entry, because goods of defendant were upon the plaintiff's close, without showing how they came there, is demurrable; *Anthony* v. *Haneys*, 8 Bing. 186.

ENTRY TO RE-TAKE PROPERTY DETAINED BY PLAINTIFF.

Plea to declaration for breaking and entering plaintiff's close, that the plaintiff took the goods of the defendant without his leave, and placed them on the close, wherefore the defendant made fresh pursuit, and entered to retake the goods. (*a*)

And for a further plea in this behalf, as to entering the close of the plaintiff in the said [first] count mentioned, in which &c., and with feet in walking &c. and with the said horses &c. and with the wheels of the said carts &c. ; a little tearing up, subverting and damaging the earth and soil of the said close, the defendant says, that he the defendant just before the said time when &c. was lawfully possessed as of his own property of divers, to wit, ten cartloads of straw ; and the defendant being so possessed thereof, the plaintiff did then with force and arms &c. and without the leave or license and against the will of the defendant seize and lay hold of the said last mentioned straw and wrongfully carry away the same, and put and place the same upon the said close in the said [first] count mentioned, in which &c., and wrongfully detained it therein until the said time when &c. ; wherefore the defendant at the said time when &c. made fresh pursuit after his said straw, and then quietly and peaceably entered the said close in the said [first] count mentioned, in which &c. and with the said horses, mares, geldings and waggons in the introductory part of this plea mentioned (the same then being necessary and proper for that purpose) in order to retake his said straw, and did then and there quietly and peaceably retake his said straw and load the same upon the last mentioned waggons, and carry the same away from and out of the said close in the said [first] count mentioned, in which &c. as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff, which &c. And this the defendant is ready to verify, &c.

UNDER MESNE PROCESS.

7. UNDER MESNE PROCESS.

Justification of entry into house, and breaking inner doors, &c. under a capias, and sheriff's warrant thereon against plaintiff. (*b*)

And for a further plea in this behalf [as to (*c*) the breaking and entering the said dwelling-house of the plaintiff in the said declaration mentioned and making a noise and disturbance therein, and staying and continuing therein making such noise and disturbance, without the leave or license and against the will of the plaintiff, for the said space of time in the said declaration mentioned, and then forcing and breaking open, breaking to pieces, damaging and spoiling the said doors, windows, locks, bolts, bars, staples, and hinges of the plaintiff in the said declaration mentioned] the defendant saith, that before the said time when &c. in the said declaration mentioned, to wit, on &c. [*the teste of the writ ; here set forth the writ of capias, the indorsement for bail, delivery of the writ to the sheriff and warrant to the defendant, and delivery thereof to the defendant as in the form, ante,* 338, 339.] By virtue of which said warrant the defendant, as such bailiff as aforesaid, afterwards and before the time appointed for the return of the said writ, to wit, at the said time when &c. in the said declaration mentioned, and within the bailiwick of the said G. H. as such sheriff as aforesaid, peaceably and quietly entered into the said dwelling-house in which &c. the outer door

(*a*) The plea must show that the goods came on the close by the act of the plaintiff, as the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry ; *Anthony* v. *Haneys*, 8 Bing. 186 ; 1 M. & Scott, 300 ; *Patrick* v. *Colerick*, 3 M. & W. 485, 486.

(*b*) See the form, Thomp. Ent. 299 ; and as to this plea in general, 3 B. & P. 229 ; 4 Taunt. 619. As to the breaking open of outer doors, see Tidd's Prac. 9th ed. 1012.

(*c*) This enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

UNDER MESNE PROCESS.

thereof then being open, (*d*) and there then being reasonable and sufficient ground and cause for the defendant to suspect and believe, and the defendant then suspecting and believing, that the plaintiff then was in the said dwelling-house, in order to take and arrest the plaintiff under and by virtue of the said writ and warrant as it was lawful for him to do for the cause aforesaid; and in order to arrest the plaintiff under and by virtue of the said writ and warrant, he the defendant did then necessarily and unavoidably make a little noise and disturbance in the said messuage or dwelling-house, and stay and continue therein making such noise and disturbance for the said space of time in the said declaration mentioned. And the defendant further saith, that at the said time when &c. in the said declaration mentioned, the plaintiff not having been taken or arrested under or by virtue of the said writ or warrant, and the entrance of divers, to wit, —— rooms and —— apartments in the said dwelling-house in the said declaration mentioned, and of and belonging to the same, being fastened and stopped by and with the said doors, (*e*) windows, locks, bolts, bars, staples and hinges [in the introductory part of this plea mentioned], and there then being reasonable and sufficient ground and cause for the defendant to suspect and believe, and the defendant then suspecting and believing that the plaintiff then was in the said rooms and apartments or one of them, he the defendant did then demand and request one I. K., being the only person then present in the said dwelling-house, to deliver the keys of the said respective doors to the defendant, and to permit and suffer the defendant to enter into the said rooms and apartments in order to search for the plaintiff therein, but the said I. K. then wholly neglected and refused so to do and then obstructed and hindered the defendant from entering into the said rooms and apartments, or either of them, for the purpose aforesaid, (*f*) so that without forcing and breaking open the said doors, windows, locks, bars, staples and hinges the defendant could not at the said time when &c. enter into the said rooms and apartments to search for or arrest the plaintiff in the same; therefore he the defendant at the said time when &c. in the said declaration mentioned, in order to search for, find and arrest the plaintiff, under and by virtue of the said writ and warrant, necessarily broke open the said doors, windows, locks, bolts, bars, staples and hinges in the said declaration mentioned, and in so doing necessarily and unavoidably a little broke to pieces, damaged and spoiled the same, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which are the said several alleged trespasses [in the introductory part of this plea mentioned, and] whereof the defendant hath above thereof complained against the defendant. And this the defendant is ready to verify, &c.

8. UNDER FINAL PROCESS.

UNDER FINAL PROCESS.

Justification of entry into plaintiff's house, and seizing his goods

And for a further plea in this behalf, [as to (*g*) the breaking and entering the said dwelling-house in the said declaration mentioned, and in which &c.

(*d*) This is absolutely requisite; 11 Moore, 40.

(*e*) These averments must agree with those in the declaration, and in most cases will be found unnecessary.

(*f*) These allegations must be according to the facts; 3 B. & P. 226.

(*g*) The enumeration of the trespasses in-

UNDER FINAL PROCESS.

under a *fieri facias* against him. (*h*)

and making a noise and disturbance therein, and staying and continuing therein, making and continuing their said noise and disturbance in the said messuage or dwelling-house of the plaintiff, for the said space of time in the said declaration mentioned, (*i*) and there seizing and taking the said goods and chattels in the said declaration mentioned, and converting and disposing of the same to their own use], they the said C. D. and E. F. say, that the said C. D. before the said time when &c. in the said declaration

The judgment against plaintiff. (*k*)

mentioned, to wit, on the —— day of ——, A. D. —— [*here state the judgment in debt or assumpsit, and the reference thereto, as in the forms, ante, vol. ii. 337, 338, observing the notes, and then proceed as follows:*] And the said C. D. and E. F. further say, that afterwards and before the said time when

Fieri facias against plaintiff.

&c. to wit, on &c. [*set forth the fieri facias, indorsement to levy, and delivery thereof to one G. H. as sheriff, as ante, vol. ii. 563, and then proceed as follows:*] by virtue of which said writ the said G. H. Esq. so being sheriff of —— as

Sheriff's warrant to one of the defendants. (*l*)

aforesaid, afterwards and before the return of the said writ, and before the said time when &c. to wit, on the —— day of ——, in the year —— aforesaid, made his certain warrant in writing, sealed with the seal of his said office of sheriff of the said county of —— as aforesaid, directed to the said E. F. (he the said E. F. then and at the said time when &c. being bailiff of the said sheriff,) and by the said warrant the said sheriff then commanded him the said E. F. that of the goods and chattels of the plaintiff in his said sheriff's bailiwick, he should cause to be made as well the said debt of £—— which the said C. D. had lately recovered in the said Court of our said lady the queen, before the queen herself at Westminster aforesaid, as also the said sum of £—— for his damages, costs and charges aforesaid, so that the said sheriff might have the said sums of money before our said lady the queen at Westminster aforesaid [*or if in C. P.* "of the Bench aforesaid"] on &c. [*or*, "immediately after the execution thereof," *the return day of the writ*], to render to the said C. D. for his debt and damages, costs and

Delivery of warrant to such defendant.

charges aforesaid; which said warrant afterwards and before the return of the said writ, and before the said time when &c. to wit, on the same day and year aforesaid, was delivered to the said E. F. so being such bailiff as aforesaid, to be executed in due form of law*; by virtue of which said writ and

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tended to be justified must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

(*h*) See the forms, 9 Wentw. Index, xcviii. and cix. and as to the mode of justifying under final process in general, see Com. Dig. Pleader, 3 M. 24; *ante*, vol. i. Index, "*Process.*" A defendant cannot justify under a fi. fa. issued on the award of an arbitrator, for the 1 & 2 Vict. c. 110, does not authorise a party to issue execution for money awarded by an arbitrator; *Jones* v. *Williams*, 8 M. & W. 349. As to the right and law of breaking open doors, &c. see Tidd, 9th ed. 1011, 1012; 5 Taunt. 769; 1 Marsh. 333, S. C.; 1 Bing. N. C. 721.

(*i*) If there was any illegal abuse, as staying too long, &c. the plaintiff must new assign; 2 Camp. 175, 176; 10 East, 73.

(*k*) When the plaintiff in the original action justifies under a *fi. fa. he* must state the judgment, but the *sheriff* or *his officer need not*, and if there be any doubt as to the regularity of the judgment, the latter should plead separately; Com. Dig. Pleader, 3 M. 24; 3 Lev. 20; 2 Stra. 509, 993, 1184; 1 Wils. 17. A sheriff executing a *fi. fa.* after notice of the *allowance of a writ of error*, is liable to an action of trespass, though there has been no further supersedeas of the execution; and notice to the sheriff of such allowance is notice to his officers, and renders them liable in trespass for proceeding with the execution; *Belshaw* v. *Marshall*, 4 B. & Ad. 336, where see replication to the above effect; see also *Perkins* v. *Pymton*, 7 Bing. 676; 5 M. & P. 731, S. C.

(*l*) As to the mode of pleading a warrant, see *ante*, 339, n. (*u*). Examine with the warrant. Where only the sheriff or the plaintiff in the original action justifies, the warrant need not be stated, but where the bailiff justifies it should be stated.

UNDER FINAL PROCESS.

warrant the said E. F. so being such bailiff as aforesaid, and the said C. D. as the servant of the said E. F. and by his command, afterwards and before the return of the said writ, to wit, at the said time when &c. peaceably and quietly entered into the said messuage or dwelling-house, in which &c. (the outer door thereof being then open,) (*m*) in order to seize and take, and did then seize and take, in execution the said goods and chattels of the plaintiff [in the introductory part of this plea mentioned], the same then being in the said messuage or dwelling-house, for the purpose of levying the monies so directed to be levied by the said indorsement on the said writ and by the said warrant as aforesaid, and did then by sale thereof levy a certain sum of money, to wit, the sum of £—— part and parcel of the debt and damages, costs and charges aforesaid; (*n*) and in so doing, the said E. F. so being such bailiff as aforesaid, and the said C. D. as his servant as aforesaid, did then necessarily and unavoidably make a little noise and disturbance in the said messuage or dwelling-house, and stay and continue therein making such noise and disturbance for the said space of time in the said declaration mentioned,† as they lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff on that occasion; which are the said several alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above thereof complained against the said C. D. and E. F. And this the defendants are ready to verify, &c.

Entry and seizure by the two defendants.

Justification of entry into plaintiff's house under a *fi. fa.* against *another person.* (*o*)

This plea is similar to the former as far as the asterisk, omitting the enumeration of the trespasses, and what relates to the seizure of the goods, and stating that the judgment was recovered and execution issued against " one J. K.," *and at the asterisk insert the following averment:*] And the said C. D. and E. F. further say, that before and at the said time when &c. divers goods and chattels of the said J. K. liable to be taken in execution by the said E. F. as such bailiff as aforesaid, under and by virtue of the said writ and warrant, were in the said messuage or dwelling-house in the said declaration mentioned, and that thereupon, under and by virtue of the said writ and warrant, the said E. F. &c. [*State the entry into the dwelling-house of plaintiff, and the seizure of the goods of J. K. therein, as supra, from the asterisk to the end, omitting what relates to the sale of the goods.*

Justification by a *sheriff* under a *fi. fa.* (*p*)

Same as in the form, ante, 404, *to the* †, *except that the judgment is not to be stated, and then proceed as follows:*] And afterwards, and before the return thereof, to wit, on the same day and year last aforesaid, sold the same goods and chattels, and by such sale thereof and of certain other goods and chattels of the plaintiff, made and levied the sum of £—— towards satisfaction of

(*m*) This is absolutely requisite; 11 Moore, 40.

(*n*) Where the plea is by the sheriff, the sale of the goods and the return of the writ may be as in the form, *post,* 406.

(*o*) See the notes to the last form. It frequently happens, that under an execution against a debtor, a fraudulent conveyance of his goods to a third person, in whose house they were taken, is set up, and he brings an action of trespass; in this case the justification must be confined, as above, to the entry into the house, and the plaintiff's property in the goods put in issue by a special traverse of that allegation. A party cannot justify entering the house of a stranger under a *fi. fa.* against a third person, unless such third person's goods were actually in the house; 5 Taunt. 769; 1 Marsh. 333, S. C.; Tidd, 9th edit. 1011; and see Palm. 52; 6 Taunt. 246; 1 Marsh. 565, S. C.

(*p*) See the notes to the form, *ante,* 404. Though the above form is given, it does not appear to be necessary in this case to state a

UNDER FINAL PROCESS.

the debt and damages aforesaid, as it was lawful for him so to do for the cause aforesaid. And the defendant afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, paid to the said E. F. the sum of £——, part of the said sum of money so made by sale of the said goods and chattels as aforesaid, in part satisfaction of the debt and damages aforesaid; and afterwards, and at the return of the said writ, to wit, on &c. returned the said writ to the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid, and then returned thereon, that by virtue thereof he had caused to be levied of the goods and chattels of the plaintiff the said sum of £——, part whereof, to wit, the sum of £——, he had retained for poundage due on the said levy, and that £——, residue thereof, he had paid to the said E. F. in part satisfaction of the debt and damages therein mentioned, and that the plaintiff had not any other or more goods and chattels in the bailiwick of him the defendant, whereof the defendant could cause to be levied the residue of the said debt and damages, or any part thereof, which are, &c. [*Same as the form, ante,* 405, *to the end.*

Another plea under writ of *fi. fa.* to trespass for breaking and spoiling a lock &c. of an outer door, that defendant was lawfully in the house, but could not carry away the goods without opening the door, and because the plaintiff was not there to open it, defendant broke it open. (*q*)

See *Pugh* v. *Griffiths*, 7 A. & E. 827; 3 N. & P. 187, S. C.

UNDER STATUTES.

9. UNDER STATUTES.

Plea by a surveyor justifying digging &c. as surveyor, under General Highway Act, 6 W. 4, c. 50. (*r*)

And for a further plea in this behalf, [as to (*s*) the breaking and entering the said piece or parcel of land, part of the said close in which &c. situate, lying and being in the said parish of ——, in the county of ——, and with feet in walking treading down, trampling upon, consuming and spoiling the grass, ling, furze, fern and herbage of the said F. there growing, and digging up, tearing up, damaging and spoiling the soil of the same piece or parcel of land, and digging up, taking and carrying away, in and from the said piece or parcel of land, the said stones, gravel and sand in the said declaration mentioned, and as to the seizing, taking and carrying away the said gravel, stones and sand of the said J. in the said last count mentioned], the defendants say, that the said W. S. before and at the several times when &c. was and still is a surveyor of the highways in and for the said parish of

return; 10 East, 73. It is said, indeed, in 1 Salk. 409; Com. Dig. Pleader, 3 M. 24; 6 T. R. 235, that in justifying under a *fi. fa.* the sheriff or other principal officer must show that the process has been returned; but this seems erroneous, for the distinction is between *mesne* and *final* process, and no return need in general be stated in pleading; 4 Rep. 67 a; 5 Rep. 90 a; 2 Salk. 700; Ld. Raym. 776; Com. Dig. Return, E. I. Execution, C. 7; 10 East, 73; 5 B. & C. 489.

(*q*) In pleading these facts, it is not necessary for the defendant to aver that the trespass did not happen through his own default, as such a fact should be replied affirmatively by the plaintiff; *Pugh* v. *Griffiths, supra.*

(*r*) See the sections of the General Highway Act, authorising the surveyor &c. to take materials, and decisions thereon, 3 Burn. J.; as to the appointment of the surveyor, see *id.* The 109th sect. of the act allows the defendant to give the matter in evidence under the general issue, and limits the time for bringing actions. Section 78 provides that the defendants shall not be deemed trespassers *ab initio.* See also *Morrell* v. *Martin*, 3 M. & G. 581.

(*s*) The enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

——, and duly appointed to that office, in pursuance of the statute in that case made and provided; and that before and at the said several times when &c. the highways within the said parish of —— being out of repair, and there being occasion for stones, sand and gravel to repair the same, and the said piece or parcel of land [in the introductory part of this plea mentioned, and] in which &c. before and at the said several times when &c. being certain waste land and common ground in the said parish of ——, he the said W. S. as such surveyor as aforesaid, and the said W. F., W. P. and I. S., as his servants and by his command, at the said several times when &c. entered the said piece or parcel of land [in the introductory part of this plea mentioned,] in which &c. being such waste land and common land as aforesaid, for the purpose of searching for, digging for, getting and carrying away, and did then dig up and carry away, the said stones, gravel and sand in the said declaration mentioned, from and out of the said piece or parcel of land [in the introductory part of this plea mentioned,] so being waste land and common ground as aforesaid, for the mending of the said highways so out of repair as aforesaid, and for the use thereof, the same being fit and necessary for that purpose, and then used and applied the said stones, gravel and sand, so dug up, taken and carried away as aforesaid, in and about the necessary repairing and amending of the said highways, as it was lawful for them so to do. And this the defendants are ready to verify, &c.

Plea, justifying entering house, and turning out plaintiff and his goods, by one defendant as churchwarden and the other as constable, under a magistrate's warrant, to put the churchwardens and overseers in possession, in pursuance of the 59 Geo. 3, c. 12, s. 24, plaintiff having intruded himself into the house. (t)

And for a further plea in this behalf, [as to (u) the breaking and entering the said dwelling-house in the said declaration mentioned, and making a noise and disturbance therein, and staying and continuing therein making such noise and disturbance for the said space of time in the said declaration mentioned, and then forcing and breaking open, breaking to pieces, damaging and spoiling one of the said doors, locks, staples and hinges of and belonging to the said dwelling-house in the said declaration mentioned, and as to the said seizing and taking the said goods and chattels in the said declaration mentioned, and carrying away the same, and then ejecting, expelling, putting out and amoving the plaintiff and his family from and out of the said dwelling-house in which &c. in the said declaration mentioned, and keeping and continuing him so expelled, put out and amoved for the said space of time in the said declaration mentioned, and by the defendants above alleged to have been done,] the defendants say, that the said dwelling-house in which &c. in the said declaration mentioned, before and at the said times when &c. was and is a certain dwelling-house, situate in the parish of D. in the said county of B. and belonging to and provided by and at the charge of the said parish of D. for the habitation of the poor of the said parish, of which said parish the said W. at the said time when &c. was one of the churchwardens, and that afterwards, and before the said time when &c. to wit, on the —— day of ——, in the year of our Lord ——, the plaintiff unlawfully intruded himself into the said dwelling-house in which &c. and from thence until and at the time of the making the complaint hereinafter mentioned,

(t) See the enactment 1 Chit. Col. Stat. 679, 680, and notes; and see 5 & 6 W. 4, c. 69, s. 5. See also further act 2 W. 4, c. 42; and also the cases in 4 B. & C. 462; 6 D. & R. 524, S. C.; 6 B. & C. 433; 8 D. & R. 43, S. C.; 8 B. & C. 4; *Doe* v. *Cockell*, 6 Car. & P. 525.

(u) The enumeration of the trespasses intended to be justified must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

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remained in possession thereof, and had refused and neglected to quit the same, and deliver up possession thereof to the churchwardens and overseers of the poor of the said parish of D. within one month after a certain notice and demand in writing for that purpose, signed by the churchwardens and overseers of the poor of the said parish of D. which had before then, to wit, on the —— day of —— been delivered to the plaintiff, and since the delivery of which upwards of one month at that time had expired; whereupon the defendant W. then being one of the churchwardens of the said parish as aforesaid, afterwards, to wit, on the —— day of ——, in the year ——, duly preferred an information and complaint upon oath against the plaintiff of the premises aforesaid, before J. M. and J. N. Esquires, two of her Majesty's justices of the peace in and for the said county of B., and thereupon afterwards, to wit, on the same day and year last aforesaid, the said J. M. and J. N. Esquires, as such justices as aforesaid, according to the form of the statute in such case made and provided, duly issued the summons under their hand and seals to the plaintiff, and thereby then required the plaintiff personally to appear before them, and such other of her majesty's justices of the peace for the said county of B. as should be present at the [Sun Inn] in W. in the said county of B. in &c. —— ——, then instant, at —— o'clock in the forenoon, then to answer the premises, and then caused the said summons to be delivered to the plaintiff upwards of seven days before the said —— day of ——, in the said summons mentioned, to wit, on the —— day of ——, in the year ——; and thereupon afterwards, to wit, on the —— day of —— at the said [Sun Inn] in W. aforesaid, the plaintiff, so having been duly summoned to appear before the said justices as aforesaid, then appeared before the said justices, and the said justices did then proceed to hear and determine the matter of the said complaint, according to the form of the statute in such case made and provided, but the plaintiff did not show sufficient cause why possession of the said dwelling-house should not be delivered up to the said churchwardens and overseers of the poor of the said parish of D., and thereupon the said justices, according to the form of the statute in such case made and provided, did then find and adjudge the same complaint to be true. And thereupon the said J. M. and J. N. Esquires, so being such justices for the said county of B. aforesaid, afterwards, and before the said time when &c. to wit, on the said day and year last aforesaid, according to the form of the statute in such case made and provided, duly made and issued their certain warrant under their hands and seals, directed to the chief constables of the hundred of W., in the county of B. and to the petty constables of the parish of D. in the said hundred and county, and to each and every of them, and there charged and commanded them that they should without delay go to and cause possession of the premises in question, being the said dwelling-house, in which &c. in the said declaration mentioned, to be delivered to the churchwardens and overseers of the poor of the said parish of D., or some or one of them, pursuant to and in compliance with the directions of an act passed in the 59th year of the reign of King George the Third, intituled, "An Act to amend the Laws for the Relief of the Poor," which said warrant, afterwards, and before the said time when &c. to wit, on the —— day of ——, A.D. ——, was delivered to the defendant R. who then and at the time of the making of the said warrant, and from thence until and at the said times when &c. was a

Notice to quit.

Information before magistrates.

Summons on plaintiff to appear.

Plaintiff's appearance before magistrate.

Adjudication.

Warrant.

Delivery thereof to the constable, one of the defendants.

petty constable of the said parish of D. in due form of law to be executed; by virtue of which said warrant, he the said R. so being such constable as aforesaid, in order to deliver the peaceable and quiet possession thereof to the said churchwardens and overseers of the said parish, and the defendant W. in order to take such possession thereof, afterwards, to wit, at the times when &c., the same being in the day time, broke and entered into the said dwelling-house in which &c. in the said declaration mentioned; and because the plaintiff and his family, although they were then requested so to do, refused to depart and go out of the said dwelling-house, the defendants then gently put out and amoved the plaintiff and his said family from the said dwelling-house in the said declaration mentioned, and the defendant R. then delivered the peaceable and quiet possession thereof to the defendant W. as such churchwarden and overseer as aforesaid, for and on behalf of himself and the said other churchwarden and overseers of the said parish; and the defendant W. in his own right, as such churchwarden as aforesaid, and the other defendant, as his servant and by his command, then kept and continued the plaintiff and his family so put out and amoved from the said dwelling-house for the said space of time in the said declaration mentioned, using no unnecessary violence towards the plaintiff and his said family on any of the occasions aforesaid; and because the said goods and chattels in the said declaration mentioned were then wrongfully in the said dwelling-house encumbering the same, the defendant W. as such churchwarden as aforesaid, in his own right, and the other defendant, as his servant and by his command, seized and took the said goods and chattels in the said declaration mentioned, then found and being in the said dwelling-house in which &c. and removed and carried them away to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage to the said goods and chattels on the occasion aforesaid; and the defendants in and about the premises necessarily made a little noise and disturbance in the said dwelling-house in which &c., and did stay and continue therein making such noise and disturbance as in the said declaration mentioned. And the defendants further say, that at the said time when &c. in the said declaration mentioned, the outer door of the said dwelling-house in which &c. was fastened and stopped by and with the said locks, staples and hinges in the introductory part of this plea mentioned; and because the plaintiff and his said family, having been first peaceably and quietly requested so to do by the said W. as churchwarden as aforesaid, and by the other defendant as such constable as aforesaid, then refused to unfasten the same, and then hindered, obstructed and prevented the defendants from entering into the said dwelling-house in which &c. for the purpose aforesaid, so that without forcing and breaking open the said outer door, locks, staples and hinges, the defendant could not at the said time when &c. enter into the said dwelling-house in order that possession thereof might be delivered to the said W. so being churchwarden of the said parish of D. as aforesaid, therefore the said R. at the said time when &c., and the said W. in his aid and by his command, in order to cause possession of the said dwelling-house in the said first count mentioned to be delivered to the said W. as such churchwarden as aforesaid, and under and by virtue of the said warrant necessarily broke open the said outer door, locks, staples and hinges in

Entry &c. thereunder.

Plaintiff's refusal to depart.

Churchwarden acts in aid of constable, &c.

Removal of chattels encumbering the house, &c.

Outer doors fastened, and broken open.

UNDER STATUTES.

the said declaration mentioned, and in so doing necessarily and unavoidably a little broke to pieces, damaged and spoiled the same, doing no unnecessary damage to the plaintiff on the occasion aforesaid as they lawfully might for the cause aforesaid, which are the said several alleged trespasses [in the introductory part of this plea mentioned, and] whereof the plaintiff hath above in his said declaration complained against them the defendants. And this the defendants are ready to verify, &c.

Plea that plaintiff was unlawfully in the occupation of the premises, justifying entry &c. under same statute.

And for a further plea in this behalf, the defendants say, that the said dwelling-house in which &c. in the said declaration mentioned, before and at the said times when &c. in the said declaration mentioned, was and is a certain dwelling-house situate in the said parish of D. in the said county of B., belonging to and provided by and at the charge of the said parish of D. for the habitation of the poor of such parish, of which said parish the said W. W. at the said times when &c. was one of the churchwardens; and that afterwards, and before the said times when &c., to wit, on the —— day of ——, A. D. ——, the plaintiff unlawfully intruded himself into and was in the occupation of the said dwelling-house in which &c., and from thence until and at the time of the making the complaint hereinafter mentioned remained in possession thereof, and had neglected and refused to quit the same, and deliver up possession to the churchwardens and overseers of the poor of the said parish of D. within one month after a certain notice and demand in writing for that purpose, signed by the churchwardens and overseers of the poor of the said parish of D., which had before then, to wit, on the —— day of ——, A. D. ——, been delivered to the plaintiff, and since the delivery of which upwards of one month had expired, whereupon the defendant W. W., so then being one of the churchwardens of the said parish, to wit, on the —— day of ——, A. D. ——, duly preferred an information and complaint upon oath against the plaintiff of the premises aforesaid, before W. M. and B. W. Esquires, two of her majesty's justices of the peace in and for the said county of B., and thereupon afterwards, to wit, on the same day and year last aforesaid, the said W. M. and B. W. Esqrs., as such justices as aforesaid, according to the form of the statute in such case made and provided, duly issued a certain summons under their hands and seals to the plaintiff, and thereby then required the plaintiff to appear before them and such other of her majesty's justices of the peace for the said county of B. as should be present at the [Sun Inn] in W. in the county of B., on Saturday, the —— day of —— then instant, at eleven o'clock in the forenoon, then to answer the premises aforesaid, and then caused the summons to be delivered to the plaintiff upwards of seven days before the 23d day of May in the said summons mentioned, to wit, on the 9th day of May in the year last aforesaid; and thereupon afterwards, to wit, on the said 23d day of May, at the said [Sun Inn] in W. aforesaid, the plaintiff having been so duly summoned as aforesaid, then appeared before the justices, who then proceeded to hear and determine the matter of the said complaint, according to the form of the statute in such case made and provided, but the plaintiff did not show sufficient cause why possession of the said dwelling-house in which &c. should not be delivered up to the said churchwardens and overseers of the poor of the said parish of D.; and thereupon

the said justices did then duly find and adjudge the same complaint to be true; and thereupon the said W. M. and B. W. Esqrs., being such justices of the said county of B. as aforesaid, afterwards and before the said times when &c., to wit, on the same day and year last aforesaid, at W. in the said county of B., according to the form of the statute in such case made and provided, duly made and issued their certain warrant under their hands and seals, directed to the chief constables of the hundred of W. in the county of B., and to the petty constables of the parish of D. in the said hundred and county and to each and every of them, and thereby charged and commanded them that they should without delay go to and cause possession of the said dwelling-house in which &c. to be delivered to the churchwardens and overseers of the parish of D., or some or one of them, pursuant to and in compliance with the directions of an Act passed in the 59th year of the reign of King George the Third, intituled "An Act to amend the Laws for the Relief of the Poor;" which said warrant afterwards, and before the said times when &c., to wit, on the 24th day of May, A. D. 1830, was delivered to the defendant J. K., who then and from thence until and at the said times when &c. was a petty constable of the said parish of D., in due form of law to be executed; by virtue of which said warrant, he the said J. K. so being such constable as aforesaid, and the said W. W. in his aid and assistance and by his command, afterwards, to wit, at the said times when &c., the same then being in the day-time, broke and entered into the said dwelling-house in which &c. in the said declaration mentioned, in order to cause possession of the said dwelling-house to be delivered to the said W. W. so being one of the churchwardens of the said parish of D. aforesaid, and for the purpose aforesaid, gently put out and amoved the plaintiff and his family from the possession, use, occupation and enjoyment of the said dwelling-house in the said declaration mentioned, the plaintiff and his family having refused to go and depart from and out of the said dwelling-house, although they were afterwards, to wit, on the same day and year last aforesaid, requested so to do, and then kept and continued the plaintiff and his family so put out and amoved for the said space of time in the said declaration mentioned; and because the said goods and chattels at the said times when &c. were wrongfully in the said dwelling-house encumbering the same, the defendant J. K. as such petty constable as aforesaid, and the said W. W. in his aid and assistance, and by his command, at the said times when &c. in the said declaration mentioned, seized and took the said goods and chattels in the said declaration mentioned, then found and being in the said dwelling-house in which &c. and removed and carried them away to a small and convenient distance, to wit, in the parish of D. aforesaid in the county aforesaid, and there left the same for the use of the plaintiff, doing no unnecessary damage to the said goods and chattels on the occasion aforesaid, in order to cause possession of the said dwelling-house in the said declaration mentioned to be delivered to the said W. W. so being one of the said churchwardens of the said parish of D., for and on behalf of himself and the said other churchwardens and overseers; and the defendant W. W., and the other defendant as his servant and by his command, then committed the other alleged trespasses in the introductory part of this plea referred to, as they lawfully might for the cause aforesaid. And this the defendants are ready to verify, &c.

Under a distress for rent.

See form and law *Hooker* v. *Nye*, 1 Cr. M. & R. 258; 2 Cr. M. & R. 84.

Plea to trespass in plaintiff's house and taking his goods, that the goods had been fraudulently removed there by plaintiff, to prevent a distress for rent due to one of defendants for other premises, wherefore defendants entered and distrained, under 11 Geo. 2, c. 19. (*x*)

And for a further plea in this behalf, the defendants say, that the plaintiff, on &c. [*day when rent fell due*] and for a long space of time then last past, and from thence until and at the said time when &c. held and enjoyed certain premises, situate and being in the parish of ——, in the county aforesaid, as tenant thereof to the said C. D. under and by virtue of a certain demise thereof, before then, to wit, on the —— day of ——, A. D. ——, made by the said C. D. to the plaintiff for the term of —— years from thence next ensuing, [*or* " for one whole year from thence next ensuing, and so on from year to year as long as the plaintiff and the defendant should think fit (*y*)], upon which demise a certain yearly rent, to wit, the rent or sum of £ ——, was reserved and made payable by the plaintiff to the said C. D., by four even and equal quarterly payments, to wit, on &c. [*stating the days of payment*] and the said C. D. further saith, that just before the said time when &c. to wit, on the (*z*) day and year last aforesaid, a large sum of money, to wit, the sum of £—— of the rent aforesaid, for [one quarter] of a year of the said demise, ending on the day and year last aforesaid, became and was due, owing and payable from the plaintiff to the said C. D., and then and from thence until and at the said time when &c. remained and continued due, in arrear, and unpaid; and the said C. D. and E. F. further say, that just before the said time when &c. that is to say, " after the said rent became and was due and payable, and when the same was actually due, in arrear, and unpaid, (*z*) and" within thirty days next before the said time when &c. the plaintiff fraudulently and clandestinely conveyed away, and carried off and from the said premises so held and enjoyed by the plaintiff, as such tenant thereof to the defendant as aforesaid, the said goods and chattels in the said declaration mentioned, *being the proper goods and chattels of him the plaintiff*, (*a*) to prevent the defendant from distraining the same for the said rent, so " before and at the time of the said removal actually" due, in arrear and unpaid as aforesaid, and for that purpose conveyed the said goods and chattels in the said declaration mentioned to the said [warehouse] in which &c. *without leaving any other goods or chattels in the said premises, so held by the plaintiff as aforesaid,*

(*x*) See the avowries, *ante*, 300, and notes. This defence cannot, under 11 Geo. 2, c. 19, be given in evidence under the general issue, but must be pleaded specially; *vide* 1 Esp. Rep. 257; 4 Campb. 136; *Postman* v. *Harrell*, 6 Car. & P. 225. If a third person sues for the entry into his house, and taking the goods as his goods, the justification must be confined to the entry into the house, and the plaintiff's property in the goods must be denied in a separate plea; *Fletcher* v. *Marillier*, 9 A. & E. 457; 1 P. & D. 354, S. C.; for the statute 11 Geo. 2, c. 19, s. 1, 2, only applies to the *tenant's* goods being fraudulently removed, and even protects subsequent *bonâ fide* sales, and does not extend to a lodger removing his goods; *Postman* v. *Harrill*, 6 Car. & P. 225. In the latter case it will not be necessary to state how the goods were disposed of. As to what cases are within the act, and what will be a good defence under this plea, see *ante*, vol. ii. 345, 346. The plaintiff cannot reply *de injuriâ* to this plea; *Bowler* v. *Nicholson*, 4 P. & D. 16; 12 A. & E. 341, S. C.

(*y*) See *Bowler* v. *Nicholson*, 12 A. & E. 353.

(*z*) It is now settled, that the statute 11 Geo. 2, c. 19, applies only to removals *after* the rent is actually due and in arrear; *vide* 3 Esp. N. P. Rep. 16; 1 Saund. 284 a; *Rand* v. *Vaughan*, 1 Hodges, 173; *ante*, vol. ii. 346. *Sed vide* 4 Campb. 136. Rent is not actually due until the last instant of that day on which it is made payable; see also 2 Saund. 2 a, b.

(*a*) It must appear that the goods removed were the property of the tenant, for it seems, by analogy with the decision on the statute 8 Anne, c. 14, reported in Strange, 787, that the statute 11 Geo. 2, c. 19, s. 2, does not extend to lodgers or persons not being *immediate* tenants. See *Thornton* v. *Adams*, 5 M. & S. 38.

whereon the defendant could or might distrain for such arrear of rent as aforesaid, (*b*) for which reason, and because the said rent still remained in arrear and unpaid, and because there was no sufficient distress upon the said premises so held by the plaintiff as aforesaid, whereon the said C. D. could distrain for such arrear of rent; (*c*) and because the said goods and chattels, which had been so fraudulently and clandestinely conveyed away and carried off by the plaintiff as aforesaid, still remained and were in the said [warehouse] in which &c. to which the same had been so conveyed as aforesaid, the said C. D. in his own right, and the said E. F. as the servant of the said C. D. and by his command, afterwards, and while the said rent so remained due, in arrear and unpaid as aforesaid, and within thirty days (*d*) next after the said goods and chattels were and had so been fraudulently and clandestinely conveyed away and carried off as aforesaid, that is to say, at the said time when &c. entered into the said [warehouse] in which &c. in the said declaration mentioned (*e*) (the outer door thereof being then open), (*f*) in order to seize and take the said goods and chattels, so therein being as aforesaid, as a distress for the said arrear of rent so due and owing unto the said C. D. as aforesaid, and did thereupon, at the said time when &c. and within thirty days next after the said goods and chattels had been and were so fraudulently and clandestinely conveyed away and carried off as aforesaid, in the said [warehouse] in which &c. take and seize the said goods and chattels [in the introductory part of this plea mentioned] so there found, as a distress for the said arrear of rent (the same then remaining due, in arrear and unpaid), (*g*) and did impound the same at a small and convenient distance from the said [warehouse] in which &c. and did thereupon give due notice of such distress, and of the cause of such taking, and also of the said place where the said furniture, goods and chattels were impounded, unto the plaintiff, and did keep and detain the said goods and chattels, under the said distress, for the space of five days next after the taking and carrying away the same as aforesaid, in order to give the plaintiff an opportunity to replevy the same, according to the form of the statute in such case made and provided; and the plaintiff not having replevied the said goods and chattels, within the said space of such five days, the said C. D. in his own right, and the said E. F. as his servant and by his command, afterwards, and after the expiration of the said space of five days, to wit, on the —— day of ——, in the year aforesaid, caused the same to be in due manner appraised by two sworn appraisers, (*h*) according to the form of the statute in such case made and provided; and after such appraisement the said C. D. and E. F. kept

(*b*) These words, though commonly used, appear to be unnecessary.

(*c*) This averment, though usual, appears to be unnecessary.

(*d*) The statute requires the distress to be made within thirty days after the removal.

(*e*) Landlords and lessors are empowered, by 11 Geo. 2, c. 19, s. 7, *to break open in the day time, with the assistance of a peace officer,* any place where goods, fraudulently removed, are deposited, even a dwelling-house, "oath being first made before some justice of the peace of a *reasonable ground* to suspect such goods to be therein." See also 2 Saund. 284 b. A justification under this section of the act must aver that a *constable* was *present* at the time of the breaking; *Rich* v. *Woolley*, 7 Bing. 651; 5 M. & P. 663, S. C.

(*f*) This averment is necessary; see 11 Moore, 40.

(*g*) The stat. 11 Geo. 2, c. 19, s. 1, directs, that the goods shall be disposed of "in such manner as if they had been distrained on the premises," and therefore the plea proceeds to show that the directions of the stat. 2 W. & M. s. 1, c. 8, have been complied with.

(*h*) *Quære*, if it should not be shown by whom sworn, as directed by the stat. 2 W. & M. c. 1, s. 5.

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and detained the same for the use of the said C. D., in satisfaction of the said rent and the charges of the distress and appraisement aforesaid, (*i*) as they lawfully might for the cause aforesaid, inasmuch as the plaintiff had not replevied the said furniture, goods and chattels, or paid the said arrear of rent, together with the charges of the distress and appraisement aforesaid, to the said C. D. and E. F. And this the defendants are ready to verify, &c.

To trespass for breaking and entering plaintiff's house and taking his goods, plea as to the breaking and entering, that the goods had been fraudulently removed there by a third person to prevent a distress for rent due from him to one of the defendants, wherefore defendants entered, &c.

See plea, *Fletcher* v. *Marillier*, 1 P. & D. 354; 9 A. & E. 457, S. C.; and *ante*, 412, note (*x*).

To trespass for breaking and entering plaintiff's dwelling-house and expelling him therefrom, plea that the plaintiff was an alien artificer and was unlawfully in possession of the house under an agreement for a lease.

See stat. 32 Hen. 8, c. 16, and form of plea, *Lapierre* v. *M'Intosh*, 9 A. & E. 857; 1 P. & D. 629, S. C.

To action of trespass by the Grand Junction Railway Company, plea that the defendant was the occupier of a close which was divided by the railway, and the company not having at their own expense made a communication from one part to the other, the defendant entered. (*k*)

And for a further plea in this behalf, the defendant says, that the said close and railway in which &c. in the declaration mentioned, is part of a certain railway called the Grand Junction Railway, which said railway was made and formed under and by the authority and subject to the provisions of a certain act of parliament, to wit, an act passed in the third year of the reign of his late majesty, intituled, "An Act for making a Railway from the Warrington and Newton Railway at Warrington in the County of Lancaster, to Birmingham in the County of Warwick, to be called the Grand Junction Railway;" and that before and at the said several times when &c. in the said declaration mentioned, he the defendant was the occupier of a certain close or land through and over which the said railway was made and passed, and which said close or land had been and was by the said railway severed and divided into two parts, one part thereof being on the west side of the said railway, and the other part on the east side thereof; and the defendant says, that the plaintiffs (the said Grand Junction Railway Company) not having, after the said severance and division of the said close or land, at their own expense, made a communication from the said part of the said close or land lying on the west side of the said railway to the said part of the said

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(*i*) *Quære*, if a sale and payment of the overplus ought not to be stated, as directed by the stat. 2 W. & M. c. 1, s. 5.

(*k*) By the 183rd section of the Grand Junction Railway Act, (3 Will. 4, c. xxxiv.) it is enacted, that the owners and occupiers of lands through which the railway should be made ("except in cases in which the company should, at their own expense, have made communications from the land on the one side of the railway to the land on the other side thereof, according to any agreement with any owner or occupier thereof, or according to the provisions of the act") at all times for the purpose of occupying the said land, without payment of toll, might pass and repass directly over and across such parts of the railway as should be made in or upon their respective lands. The 186th section prohibits all persons, except the company and their servants, from crossing the railway, "except only directly crossing the same at places to be appointed for that purpose for the necessary occupation of the respective lands through which the said railway should pass;" and by the 180th section, in case of disputes, the company are to make such communication as two or more justices of the peace shall, upon the application of any owners &c., judge necessary to appoint. Under these clauses it was held, that until the company had made a communication the owners of severed lands had a right to cross the railway at any part within their respective lands; *Grand Junction Railway Company* v. *White*, 8 M. & W. 214.

close or land lying on the east side thereof, according to any agreement with any owner or occupier of the said close or land, or according to the provisions of the said act in this plea above mentioned, he the defendant, as such occupier of the said close or land, at the said several times when &c. for the purpose of occupying the said close or land, did pass from the said part of the said close or land of the defendant lying on the west side of the said railway, directly, and not otherwise, over and across the said close and railway in which &c. in such part thereof, and such part only, as had been made in and upon and then ran through the said close or land of the defendant unto and into the said part of the said close or land of the defendant lying on the east side of the said railway, the passage upon or along the said railway not being thereby or by consequence thereof in any way hindered or obstructed, nor the same, or the works connected therewith, in any way damaged, as he the defendant lawfully might; and in so doing the defendant with his feet in walking unavoidably a little trod down, trampled upon, consumed and spoiled the said grass of the plaintiffs then growing and being in the said close and railway in which &c. in such part thereof as had been made in and upon the said close or land of the defendant as aforesaid; and because the said gates, and the said hedges and fences, had been wrongfully set up and erected, and were then erected, standing and being in and across the said part of the said close and railway in which &c. which had been made in and upon the said close or land of the defendant, so that without forcing and breaking open the said gates, and breaking down, prostrating and destroying the said hedges and fences respectively, the defendant could not then go, pass and repass in the said part of the said railway and close in which &c. over and across the said close and railway in which &c. as he of right ought to have done on the occasions aforesaid, he the defendant, at the said several times when &c. in the declaration mentioned, in order to remove the said obstruction, did break and force open the said gates, and thereby did unavoidably a little damage and spoil the same, and did break down, prostrate and destroy the said hedges and fences respectively in the declaration mentioned, and removed the said gates and the materials of the said hedges and fences to a proper and convenient distance, and there left the same for the use of the plaintiffs, doing no unnecessary damage to the plaintiffs on those occasions, which are the same alleged trespasses in the declaration mentioned. And this the defendant is ready to verify, &c.

XV. PLEA IN BAR IN EJECTMENT.

In the Queen's Bench [*or* "C. P." *or* "Exchequer."]

On the —— day of ——, A. D. ——.

As of —— Term, — Vict.

C. D.
ats.
John Doe, on the demise of A. B. and others.

And the said C. D. by E. F. his attorney, says, that he is not guilty of the said alleged trespasses and ejectment [*or if several ousters are laid in the declaration*, "of the said alleged trespasses and ejectment,"] above laid to his charge, or of any part thereof, in manner and form as the said John Doe hath thereof complained against him. And of this the said C. D. puts himself upon the country, &c.

General issue. (*a*)

(*a*) See form, Tidd's Forms, 208. As to pleading to the jurisdiction, see Tidd's Forms, 9th edit. 630. As to time of appearance to plea, see Reg. Gen. Hil. T. 4 Vict.

XVI. REPLICATIONS TO PLEAS IN ABATEMENT.

1. In General.

In General.

Cassetur breve. (a)

When the plea in abatement is sufficient in form, and the plaintiff cannot answer the same, then before commencing a fresh action he must enter a cassetur on the roll in the following form to the end of the plea, and then proceed on a new line as follows:] And hereupon the plaintiff, inasmuch as he cannot deny the matters above pleaded by the defendant, but admits the same to be true, prays judgment that the said writ may be quashed, to the intent that he may cause to be issued a better writ; therefore it is considered by the Court of our said lady the queen, before the queen herself [*or in C. P.* "of the Bench aforesaid"], now here, that the said writ be quashed, &c.

Judgment accordingly.

Common replication to plea in abatement, denying allegation in plea and concluding to country.

In the Queen's Bench, [*or* "C. P." *or* "Exch. of Pleas."]

The —— day of ——, A. D. ——.

A. B. agt. C. D. } The plaintiff saith that his said writ and declaration ought not to be quashed, because he saith that [*here state the substance of the answer to the plea, and which is usually in denial, as in the following precedents, and then conclude to the country thus:*] And this the plaintiff prays may be inquired of by the country. (b)

Conclusion to the country.

Replication to a plea in abatement concluding with a verification.

The same as the last to the end of the statement of the new matter, in answer to the plea in abatement, and then conclude thus:] And this the plaintiff is ready to verify; wherefore he prays judgment, and his damages by him sustained on occasion of the non-performance of the said promise [*or according to the form of action*] to be adjudged to him, &c. [*Or the conclusion may be,* "And this the plaintiff is ready to verify; wherefore he prays judgment whether the said writ and declaration ought to be quashed."

2. To Coverture.

To Coverture.

To a plea of coverture of defendant, denying the facts. (c)

In the Queen's Bench, [*or* "C. P." *or* "Exchequer."]

The —— day of ——, A. D. ——

A. B. agt. C. D. } And the plaintiff saith that his said writ and declaration ought not to be quashed,* because he says, that at the time of issuing of the said writ against the defendant, she the defendant was not

(a) See Tidd's Forms, 228; T. Chitty's Forms, 589.

(b) When the replication to a plea in abatement properly concludes to the country, the plaintiff's attorney may immediately add the similiter and award the venire, *as well to try the issue* as to *assess the damages*, in case the issue shall be found for him. See form of issue and jury process, T. Chitty's Forms, 292.

(c) See the plea, and notes, *ante*, 14; the

To Coverture. married to the said E. F. in manner and form as the defendant hath above in her said plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

3. To Nonjoinder.

To Nonjoinder.

That the promises were made by the defendant alone. (*d*)

Commencement as in the last form, to the asterisk.] Because he saith that the said promises were not, nor was either of them, made by the defendant jointly and together with the said E. F. in manner and form as the defendant hath in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

The like replication in another form. (*e*)

That the said promises in the said declaration mentioned were and each of them was made by the defendant alone in manner and form as the plaintiff hath alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication that the omitted party was not residing within the jurisdiction of the Court. (*f*)

A. B. agt. C. D. } And the plaintiff saith that his said writ and declaration ought not to be quashed, because he saith that the said E. F. was not at the time of the commencement of this suit resident within the jurisdiction of this Court in manner and form as the defendant hath in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication that the omitted party is a certificated bankrupt, or an insolvent debtor. (*g*)

B. agt. D. } The plaintiff saith that his said writ and declaration ought not to be quashed, because he saith that he [*stating* "that after the making of the promises in the declaration mentioned, to wit, on &c." *showing the trading, bankruptcy, petitioning creditor's debt, fiat, and certificate of the omitted defendant, as in the plea of discharge under bankruptcy, ante*, 69. *The substance of the plea of discharge under an insolvent act is in like manner here to be stated, as an excuse for not joining the omitted party, ante*, 72.] And this the plaintiff is ready to verify; wherefore he prays judgment whether the said writ and declaration ought to be quashed.

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forms in Lil. Ent. 123; 2 Rich. C. P. 1, 2; 1 Mall. 9; conclude with a formal traverse and verification, but this, according to the general rule of replying in 1 Saund. 103 b. n. 3, is unnecessary; and see Reg. Gen. Hil. T. 4 W. 4, reg. 13, and *ante*, vol. i., as to traverses; and the above form of *commencement* and *conclusion* will in all cases suffice. If the defendant had been married, but her husband hath since died, the latter fact should be replied; see *Stretton* v. *Busnach*, 1 Bing. N. C. 139, where a replication that the husband was an alien, and at the time of contract residing abroad, was holden ill.

(*d*) See the pleas and notes, *ante*, 15.

(*e*) *Semble*, that when the issue is in the above form, the plaintiff's counsel has a right to begin on the trial, and tender evidence of an express separate promise by defendant; *Young* v. *Bairnes*, 1 Esp. Rep. 103; and see *Davies* v. *Evans*, 6 Car. & P. 619; and if so, then this form may be preferable to the preceding. Certainly a plaintiff may be in a situation to prove *affirmatively* that the single defendant is separately liable, as where he alone, without referring to his partner, has separately *signed a written promise or guarantee*.

(*f*) See plea and notes, *ante*, 15.

(*g*) See plea and notes, *ante*, 15. This form of replication is given by the 3 & 4 W. 4, c. 42, s. 9, which enacts "that to any plea in abatement in any court of law of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors."

To Non-joinder.

And the plaintiff saith that his said writ and declaration ought not to be quashed, because he saith that he issued his said writ and declared thereon, not for the non-performance of the promise mentioned in the said plea, but for the non-performance by the defendant of another and different promise, made by the defendant alone to the plaintiff, to wit, the promise in the said declaration mentioned, made as therein alleged, and being another and different promise to the promise in the said plea mentioned, and therein alleged to have been made by the defendant and the said Y. Z. jointly. And this the plaintiff is ready to verify; wherefore he prays judgment, and his damages by reason of the non-performance of the promises above newly assigned to be adjudged to him, &c.

New assignment to a plea in abatement of non-joinder of a co-contractor, that plaintiff's action is for different contracts than those mentioned in plea. (*h*)

4. To Privilege.

To Privilege.

And the plaintiff says, that notwithstanding any thing by the defendant in his said plea above alleged, this Court ought to take and will take cognizance of the plea aforesaid, because he says that the defendant, after the —— day of ——, A. D. ——, and from thence for the space of one whole year then next ensuing, was a person admitted, sworn and enrolled as such attorney as aforesaid; and that the defendant from and after the said —— day of ——, in the year aforesaid, did neglect to obtain his certificate thereof, in the manner directed in and by a certain act of parliament made and passed in the session of parliament holden in the 6th and 7th years of the reign of her present majesty Queen Victoria, intituled, "An Act for consolidating and amending several of the Laws relating to Attornies and Solicitors practising in England and Wales;" whereby and by force of the said act of parliament the admission and enrolment of the defendant in the said Court of our said lady the queen, before the queen herself, as such attorney as aforesaid, became and was and from thence hitherto hath been and still is null and void, without this, that at the time of issuing the said writ in this suit, he the defendant was and from thence hitherto hath been and still is one of the attornies of the Court of our said lady the queen, before the queen herself, present here in Court in his own proper person, in manner and form as the defendant hath above in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication to a plea of privilege as an attorney, that defendant neglected to obtain his certificate. (*i*)

And the plaintiff, as to the said plea of the defendant by him above pleaded, saith, that notwithstanding anything in that plea alleged, the defendant ought to answer to the said writ and declaration, because he saith, that though true it is that the defendant before the commencement of this action was one of the attornies of the said Court of our said lady the queen, before the queen herself at Westminster, in the county of Middlesex, as the defendant hath above in his plea in that behalf alleged, and was admitted, enrolled and sworn as such attorney of the said Court of our said lady the queen, before the queen herself as aforesaid, before the —— day of ——, A. D. ——; nevertheless, for replication in this behalf, the plaintiff saith

Replication to a plea of privilege, that defendant did not obtain his certificate as an attorney of Q. B.

(*h*) See form of new assignment, in bar to a plea of judgment recovered, *post*; and see *Sheppard* v. *Baillie*, 6 Term Rep. 327.

(*i*) See form of plea, *ante*, 12.

To Privilege. that the defendant, so being admitted, enrolled and sworn as such attorney of the said Court of our said lady the queen, before the queen herself, after the —— day of ——, A. D. ——, did neglect to obtain his certificate thereof, in the manner directed by a certain act of parliament made and passed in the session of parliament holden in the 6th and 7th years of the reign of her present Majesty Queen Victoria, intituled &c. for the space of one whole year, to wit, from &c. to &c. by means whereof, and by force of the said statute, the said admission and enrolment of the defendant in the said Court of our said lady the queen, before the queen herself, as such attorney as aforesaid, became and was thenceforth and still is null and void and the defendant by reason thereof became and from thenceforth was and still is incapable of practising in his own name, or in the name of any other person, in the said Court of our said lady the queen, before the queen herself. And this he the plaintiff is ready to verify; wherefore he prays judgment, and that the defendant may answer over to the said writ and declaration, &c.

XVII. REPLICATIONS TO PLEAS IN ASSUMPSIT.

Observations.]—The several replications, whether in assumpsit or debt, or other form of action, must necessarily depend on the facts of each particular case, and on the plea or defence advanced by the defendant, to which it is the answer, subject to certain rules, and principally that the replication must support and not *depart* from the declaration. A replication must be by one of four descriptions, as first, replications of matter of estoppel; secondly, *denial* of the allegations in the plea; third, admitting such allegations, but avoiding the effect of such plea on some new ground; or, fourthly, *new assignments.*

1. In General.

In General.

Estoppel. (a)

The replication of matter of estoppel commences differently from other replications, and is as follows:] And plaintiff saith that the defendant ought not to be admitted or received to plead the said plea by him [secondly] above pleaded, as to so much thereof, wherein he alleges that &c. [*stating the part of the plea to which the estoppel relates.*] Because he says, that &c. [*here state the grounds of estoppel either by the pleadings and verdict in a former suit, or by a bond, &c. as in the forms referred to in the note (a) and conclude as follows:*] And this the plaintiff is ready to verify; wherefore he prays judgment if the defendant ought to be admitted or received against the said record [*or* "against his own acknowledgment by his deed aforesaid,"] to plead the plea by him [lastly] above pleaded in this suit, to wit, that &c. [*stating and concluding with the allegation in that part of the plea to which the estoppel relates.*

(a) See the requisites and forms of *replications* of estoppel, 3 East, 348 to 351; Willes, 10; 1 Saund. 257; 6 T. R. 62; and of *rejoinders* of estoppel, Carth. 65; 1 Saund. 325, n. 4; *ante*, vol. i. 628. It is now settled that matter of estoppel *in pais* may be pleaded; *Sanderson* v. *Collman*, 4 M. & G. 209. Matter of estoppel, if it appear on the record, should be demurred to, 2 Stra. 817; 2 Ld. Raym. 1550; if not, it should be pleaded, 2 B. & A. 662; 3 East, 346; see *Doe* v. *Huddart*, 4 Dowl. 437, as to the necessity of *relying on an estoppel by pleading* it specially; though estoppel be not pleaded, the jury may find it specially, and the Court will thereupon give judgment accordingly, Com. Dig. Pleader, S. 5. Estoppel, E. 10; 2 B. & A. 662. Reg. H. T. 4 Will. 4, reg. 9, as to the form of a replication expressly excepts cases where an estoppel is pleaded.

IN GENERAL.

In the Queen's Bench, [*or* "Common Pleas," *or* "Exchequer."]
The —— day of ——, A. D. ——. (*c*)

Special *similiter*. (*b*)

A. B. agt. C. D. } And the plaintiff as to the plea of the defendant by him [first] above pleaded, and whereof he hath put himself upon the country, doth the like.

Commencement of a replication to a special plea. (*d*)

And the plaintiff as to the plea of the defendant by him [secondly] above pleaded saith, that &c. [*here state the subject-matter of the replication.*

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer."]
The —— day of ——, A. D. ——.

The like suggesting the death of one of the defendants.

A. B. agt. C. D. } And the plaintiff saith, that since the pleading the said plea, and before this day, that is to say, on the —— day of —— last, the said E. F. died, and the said C. D. survived him, which allegation the said C. D. doth not deny, but admits the same to be true, therefore let all the proceedings in this cause against the said E. F. be stayed. And the plaintiff as to the said plea of the said C. D. and E. F. by them first above pleaded, and whereof they have put themselves upon the country, doth the like. And the plaintiff as to the said second plea &c. [*Same as in the above form.*

Conclusion to *the country.*

And this he the plaintiff prays may be inquired of by the country, &c.

Conclusion with a *verification.*

And this he the plaintiff is ready to verify, &c.

Replication *de injurid.* (*e*)

And the plaintiff, as to the plea of the defendant by him [secondly] above pleaded [to the first count in the said declaration], says, that the defendant of his own wrong and without the cause by him in his said [second] plea alleged, broke his said promise in the said [first count of the] declara-

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(*b*) When the defendant pleads only one plea, and concludes to the country, and the issue is immediately made up, the *similiter* is not framed in this mode, but the words, "*and the said plaintiff doth the like,*" added at the end of the plea, with an award of the venire, Rich. C. P. 148; but when the plaintiff does not wish immediately to proceed to trial, the special *similiter* is adopted; and when there are several pleas, some concluding to the country and others with a verification, the special *similiter* to all the former is proper, inserting the words "secondly," "thirdly," &c. "above pleaded," &c.

(*c*) The similiter, whether added by a party for himself or for his adversary, is not a pleading within the meaning of the Reg. Gen. H. T. 4 Will. 4, so as to require a date; *Edden* v. *Ward*, 12 A. & E. 428; 4 P. & D. 155, S. C. See however a contrary opinion intimated by Park, B., *Middleton* v. *Woods*, 6 M. & W. 136. See also *Shackell* v. *Ranger*, 3 M. & W. 409.

(*d*) This is the proper mode of commencement when the replication denies or contains an answer to the whole of the plea, but when the replication contains only an answer to a part of the plea, it must, in the commencement, be qualified accordingly, because a replication assuming to answer the whole of the plea, but in fact only answering a part, is insufficient; 1 Saund. 28, n. 3; Com. Dig. Pleader, F. 25; *ante*, vol. i. Index, "*Replication.*"

(*e*) When this replication is or not admissible, see *ante*, vol. i. 609, 633. A replication "that the said plea and the statement therein contained, in manner and form as the same are therein pleaded, are not true in substance and in fact," concluding to the country, is bad on special demurrer, as being an informal *de injuria*; *Mitchell* v. *Cragg*, 10 M. & W. 367. *Quære*, whether when *de injuria* is the proper replication, the plaintiff can traverse in *extenso*, see *Plight* v. *Cook*, 1 D. & L. 714.

Where (in assumpsit) the plea admitted the contract in fact, but sought to avoid it on the ground of illegality, it was held that such plea set up the matter of excuse, and that *de injuria* was a proper replication; *Scott* v. *Chappellow*, 4 M. & G. 336; and see *Gibbons* v. *Mottram*, 1 D. & L. 910.

tion mentioned, [*or* "neglected to pay the amount of the money in the said order specified,"] (*f*) in manner and form as the plaintiff hath above thereof complained. And this the plaintiff prays may be inquired of by the country, &c.

2. Fraud.

The —— day of ——, A. D. ——.

Replication that the policy was not obtained by fraud or misrepresentation, and that the representation was not false or fraudulent. (*g*)

And the plaintiffs, as to the said plea of the defendants by them first above pleaded, say, that the said deed poll or policy of assurance was not obtained from the defendants by the fraud, covin or misrepresentation of the plaintiffs, or any or either of them, or by the fraud, covin or misrepresentation of any other person or persons in collusion with them or any or either of them, in manner and form as in the said plea is alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication to plea of fraud in action on a bill of exchange by last indorsee against intermediate indorser, traversing the fraud. (*h*)

And the plaintiff, as to the plea of the defendant by him [secondly] above pleaded [to the first count of the declaration], says, that the defendant did not indorse the said bill of exchange in the said [first] count mentioned, by the fraud, covin or misrepresentation of the plaintiff and the said P. T. and R. P., or any or either of them, or by the fraud, covin or misrepresentation of any other person or persons in collusion with them or any or either of them, in manner and form as in the said [second] plea is above alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea in an action on a cheque by holder against the drawer, that it was given for a gaming debt and indorsed to the plaintiff without consideration, replication that it was delivered for a good consideration. (*i*)

And the plaintiff, as to the plea of the defendant by him secondly above pleaded, says, that the said B. L. transferred and delivered the said cheque to the plaintiff, and the plaintiff took and received the same from the said B. L. for a good and sufficient consideration to the amount of the cheque, and that the plaintiff held and still holds the same for such consideration. And this the plaintiff prays may be inquired of by the country, &c.

To plea in action on a promissory note, that the note was given to the plaintiff to pay debts, which he had not done, replication that the defendant was to pay the note first, and special traverse. (*k*)

And the plaintiff, as to the plea of the defendant by him [first) above pleaded as to the sum of £——, parcel of the monies in the first count mentioned, and for which the said note therein also mentioned was made, says, that the defendant, at the request of the said persons in the said [first] plea

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(*f*) If the plea in effect deny the promise as laid in the declaration, then a replication that the defendant *broke his* promises of his own wrong, would be incorrect; *Solly* v. *Neish*, 1 Gale, 227.

(*g*) See plea, *ante*, 34.

(*h*) The replication need not reply to the allegation of absence of value and consideration; *Daniels* v. *Coombe*, 2 M. & G. 347.

(*i*) It has been decided by the Court of Queen's Bench that the illegal drawing of the cheque is so admitted on this issue as to throw on the plaintiff the onus of proving the consideration; *Bingham* v. *Stanley*, 1 G. & D. 237; but see *Smith* v. *Martin*, 9 M. & W. 304, *contra*. Where to an action by the indorsee against the acceptor of a bill, the defendant pleaded that he accepted the bill for the accommodation of the drawer and without any consideration, and the drawer indorsed to and the plaintiff held the bill without consideration, and the plaintiff replied that he was the holder for consideration, it was decided that the defendant must make out a case of fraud or suspicion, and that the circumstance of a bill having been given for accommodation (admitted by the pleadings) is not sufficient to cast upon the holder the onus of proving a consideration; *Mills* v. *Barber*, 5 Dowl. 77; 1 M. & W. 425.

(*k*) See *Cole* v. *Cresswell*, 3 P. & D. 404.

FRAUD.

mentioned, made and delivered the note to the plaintiff, and the plaintiff took and received the same as to the sum of £—— at the like request of those persons, for the purpose of paying to them the sum of money in which the defendant so stood indebted to them, so soon as the defendant should have paid the note, without this, that the plaintiff promised the defendant to pay the sum of money so due from the defendant, as the defendant has in his said [first] plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

To similar plea in action by the indorsee against the acceptor of a bill, replication denying averment in the plea that the drawer held the bill for the special purpose therein mentioned and for the sole use and benefit of the defendant. (*l*)

And the plaintiff, as to the plea of the defendant by him above pleaded, says, that the said bill of exchange in the declaration mentioned, was not made or drawn by the said J. H. upon or accepted by the defendant, nor did the defendant deliver the same to the said J. H., nor did the said J. H. receive or hold the same for the said special purpose in the plea mentioned, and for the sole use and benefit of the said defendant, in manner and form as in the said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea in action by indorsee against acceptor of accommodation bill indorsed for the purpose of being discounted, and indorsed to the plaintiff in fraud of defendant, after it was due, replication that the bill was indorsed to plaintiff before it became due, and special traverse. (*m*)

And the plaintiff, as to the plea of the defendant by him above pleaded, says, that the said E. F. indorsed the bill in the declaration mentioned before it became due, the plaintiff not knowing the premises in the said plea mentioned, without this, that the plaintiff took the said bill by indorsement from the said E. F. after it had become due. And this the plaintiff prays may be inquired of by the country, &c.

3. To USURY.

To USURY.

To plea of usury to an action on a bill of exchange, that the bill was indorsed to plaintiffs without knowledge of usury, and for value, &c. (*n*)

And the plaintiffs, as to the said plea of the defendant by him [secondly] above pleaded to the [first] count of the said declaration, say, that the said bill of exchange in the said [first] count mentioned was indorsed to the plaintiffs after the 10th day of June, in the year of our Lord, 1830, and before the same bill became due, to wit, on the day and year in the said declaration in that behalf mentioned, for valuable consideration, that is to say, for and in consideration of the plaintiff discounting the same, and paying therefore to the said G. H., being then the holder thereof, a large sum of money, to wit, the amount of the said sum of money in the said bill of exchange, less the legal interest thereon for the time which the said bill then had to run, (*o*) and that they the plaintiffs had not at the time when the said bill was so indorsed to the plaintiffs as aforesaid, or at the time of so discounting the same, or

(*l*) This traverse is not too large, as it does not compel the defendant to prove more than he would otherwise be bound to prove in support of his plea; *Eden* v. *Turtle*, 10 M. & W. 635.

(*m*) On the issue raised by this replication, it lies on the defendant to begin by proving that the bill was due when indorsed; *Lewis* v. *Lady Parker*, 4 A. & E. 838.

(*n*) See 58 G. 3, c. 93, in favour of *bonâ fide* holders; and as to the present law, see *ante*, vol. ii. 359, n. (*b*).

(*o*) The statement of the consideration must necessarily vary in each case.

paying such consideration for the said bill of exchange as aforesaid, or at any time before, actual or any notice that the said bill of exchange had been made, accepted, indorsed or given for the usurious consideration, or upon the usurious contract in the said plea to the said [first] count in that behalf mentioned, or for any usurious consideration or upon any usurious contract whatsoever. And this the plaintiff is ready to verify, &c.

4. To Infancy.

Denial of defendant's infancy. (*p*)

And the plaintiff, as to the plea of the defendant by him [secondly] above pleaded, saith, that the defendant, at the time of the making of his said several promises in the said declaration mentioned, was of the full age of twenty-one years, and not within the age of twenty-one years, in manner and form as the defendant hath above in his said [second] plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To a plea of infancy, that the meat, &c. were *necessaries*, and that the money mentioned in the money count was *paid* for necessaries; and *nolle prosequi* to counts for money lent, had and received, and on an account stated. (*q*)

Nolle prosequi as to residue. (*t*)

And as to the plea of the defendant by him [secondly] above pleaded, so far as the same relates to the several promises in the said [first and] (*r*) counts of the said declaration mentioned, the plaintiff saith, that the said meat, drink, washing, lodging and other necessaries were at the time of finding and providing the same, necessaries for and suitable to the then degree, estate and condition of the defendant; (*s*) and that the said goods so sold and delivered as aforesaid, were at the time of the sale and delivery thereof necessaries for and suitable to the then degree, estate and condition of the defendant; and that the said money so paid as aforesaid was paid for, in and about the purchase of necessaries suitable to the then degree, estate and condition of the defendant. And this the plaintiff is ready to verify. And

(*p*) See the form, 2 Saund. 211, and which differs only in an immaterial word or two, and see 6 C. & P. 691.

(*q*) See forms, 3 Wentw. 96. and Index, iii. iv.; 1 Rich. C. P. 154; 2 Rich. C. P. 4; Morg. 222; Lil. Ent. 107; 6 C. & P. 692; and as to this replication in general, see *ante*, Index, vol. i. "*Infancy*." Upon a replication of necessaries to a plea of infancy, the question whether necessaries or not necessaries is in general a question of fact for the jury, subject to the control of the Court as to the manner in which the jury have exercised their discretion; *Harrison* v. *Fane*, 1 M. & G. 550. Necessaries include such things as are useful and suitable to the state and condition in life of the party, and not merely such as are requisite for bare subsistence; *Peters* v. *Fleming*, 6 M. & W. 42. But if the defendant be an under-graduate at one of the universities of Oxford and Cambridge, his rank or allowance are not so much to be considered as his situation in *statu pupillari* at college, with most things necessary for his subsistence found for him; *Wharton* v. *Mackenzie*, *Cripps* v. *Hills*, 13 Law. J. R., N. S., Q. B. 130. A minor may contract for necessaries upon credit, even if he has a sufficient income allowed him to supply him with necessaries suitable to his condition for ready money; *Burghart* v. *Hall*, 4 M. & W. 727.

When a plea is pleaded to two counts, to the second of which a *nolle prosequi* is entered, there is an apparent inconsistency in adding the *similiter* to the whole of that plea, thereby expressing a readiness to submit to a jury the truth of the second count, and at the same time entering a *nolle prosequi* as to that count; *Harrison* v. *Fane*, 1 M. & G. 550, note (*a*).

(*r*) This must depend on the nature and number of the counts in the declaration.

(*s*) Must show that equipage was necessary; 2 Stra. 1100; Andr. 277; Com. Dig. Pleader, 2 W. 12; 8 T. R. 578; Carth. 110; 6 C. & P. 690.

(*t*) As a count for money lent, or on an *account stated*, cannot be sustained against an infant, it is in general necessary to enter a *nolle prosequi* to those counts, unless the next replication of a ratification after full age can be proved, for an account stated by an infant is not absolutely void but voidable only, and may be ratified by him after attaining his full age; and if he does so ratify it, an action of debt as well as assumpsit may be maintained thereon; *Williams* v. *Moor*, 11

INFANCY.

hereupon the plaintiff saith, that he will not further prosecute his suit against the said defendant in respect of the cause of action in the said last count mentioned, therefore as to such cause of action let the defendant be acquitted and go thereof without day, &c.

Ratification after defendant came of age.(u)

And the plaintiff, as to the plea of the defendant, says, that the defendant, after the making of the said several promises in the said declaration mentioned, and before the commencement of this suit, (x) to wit, on &c. [*day of his becoming of age, but the precise day is not material,*] attained his age of twenty-one years. And the plaintiff further saith, that the defendant, after he had so attained his age of twenty-one years, and before the commencement of this suit, (x) to wit, on &c. [*the same day or any subsequent day*] assented to and then ratified and confirmed the said several promises in the said declaration mentioned. And this the defendant is ready to verify, &c.

Another form of replication, that the defendant promised after he came of age.(y)

And the plaintiff, as to the plea of the defendant, saith, that the defendant, after the making of his said promises, and before the commencement of this suit, to wit, on &c. [*day of becoming of age, or about it,*] attained his age of twenty-one years, and that the defendant, after he had so attained his age of twenty-one years, and before the commencement of this suit, to wit, on &c. promised in manner and form as the plaintiff hath above thereof complained against him. And this the plaintiff is ready to verify, &c.

To plea of defendant's coverture, replication that the husband was abroad, and *civiliter mortuus.*

See the replication in *Barden* v. *Keverberg*, 2 M. & W. 61; and observations of Parke B. thereon, 2 M. & W. 64.

M. & W. 256. It is not like the case of a *feme covert* whose promise is void; for to a plea of coverture the plaintiff cannot reply that the defendant was separated from her husband and living in adultery, and that he did not know of the marriage, and that the *defendant* after her husband's death promised to pay, as such a replication is a departure, the promise therein being distinct from that alleged in the declaration; *Meyer* v. *Haworth*, 8 A. & E. 467. The effect of a *nolle prosequi* entered as to any portion of a plaintiff's demand before trial, is to withdraw that part of his claim from the consideration of the jury; but such entry leaves the part of the claim so withdrawn so entirely unaffected by the verdict as to entitle the plaintiff to maintain a fresh action in respect of it; *Amor* v. *Cuthbert*, 3 M. & G. 1; 1 Dowl. N. S. 160, S. C.

(u) See forms, 3 Wentw. 98, 101; and see Chit. jun. on Contr. 35, 36. The statute 9 Geo. 4, c. 14, s. 5, requires such a promise or the ratification of it to be in writing, and to be signed by the party to be charged therewith. It is not necessary that it should contain the name of the creditor, the amount due or the date, and parol evidence is admissible to supply these particulars. The plaintiff has merely to prove the promise, and not that the defendant was of age when he made it; it lies upon the defendant to prove that he was then under age; *Hartley* v. *Wharton*, 11 A. & E. 934; 3 P. & D. 529, S. C.; *Berthwick* v. *Carruthers*, 1 T. R. 648. It seems doubtful whether to a plea of infancy the plaintiff, instead of replying in the above form, ought not to new assign the ratification as a new contract entered into after the party has obtained the capacity of contracting; *Williams* v. *Moor*, 11 M. & W. 256. The replication is not sustained by proof of a promise after action brought; 4 D. & R. 645; 2 B. & C. 826, S. C.

(x) As to the necessity for this averment, see 1 M. & Sel. 724; 3 M. & Sel. 477; 4 D. & R. 545; 2 B. & C. 826, S. C.

(y) This form is given in consequence of Lord Ellenborough's observations in *Cohen* v. *Armstrong*, 1 M. & S. 724. And see a form, in an action against the acceptor of a bill, of his ratification after he became of age, *Hunt* v. *Massey*, 5 Bar. & Ad. 902; 3 N. & M. 109, S. C.

5. To Alien Enemy.

To Alien Enemy.

Replication to plea of alien enemy, that plaintiff resided here by license. (s)

And the plaintiff, as to the said plea of the defendant, saith, that before and at the time of the commencement of this suit, he the plaintiff was and still is resident in this kingdom by the license and permission of our said lady the queen. And this the plaintiff is ready to verify, &c.

6. To Felony.

To Felony.

Replication to plea of felony of plaintiff, that he was specially pardoned by the queen's letters-patent.

And the plaintiff, as to the said plea of the defendant by him above pleaded, says, that long after the said conviction, and before the commencement of this suit, to wit, on the —— day of ——, in the second year of the reign of our said lady the now queen, by her letters-patent, bearing date at Westminster the same day and year last aforesaid, sealed with her great seal of England, and which said letters-patent he the plaintiff brings here into Court, acquitted, released and discharged the plaintiff, his heirs, executors and administrators, against our said lady the queen, her heirs and successors, of and from the said felony in the said plea mentioned, and of and from all manner of treason, felony, misprision of treasons and felonies, treasonable or seditious words or libels, seditious or unlawful meetings and convention, and all offences by reason whereof the plaintiff could be charged with the penalty and danger of death; all riots, routs, offences, contempts, trespasses and misdemeanors, and all judgments and convictions for not going to church, and of and from all forfeitures and penalties, the same or either of them before had, committed or done, and the will and pleasure of our said lady the queen was by the said letters-patent expressed to be, that the plaintiff, his heirs, executors or administrators, should not be sued, vexed or disquieted in his body, goods or chattels, lands or tenements, for the said felony or the conviction aforesaid, or for any matter, cause, contempt, misdemeanor, forfeiture, offence, or any other thing before done, committed or omitted against our said lady the queen, her crown, dignity, prerogative, laws and statutes, and that the said grant of our said lady the queen of general pardon by general words, charges and sentences in the said letters-patent before rehearsed, should be reputed, esteemed, adjudged, expounded, allowed, and taken in all the Courts of our said lady the queen most beneficially and amply for the plaintiff, and as if the particular crimes of the plaintiff had been fully and at large mentioned and expressed in the same letters-patent, as by the said exemplification of the said letters-patent more fully appears. And the plaintiff further saith, that the said several causes of action in the said declaration mentioned did accrue, and each and every of them did accrue, after the said conviction in the said plea mentioned, and before the granting of the pardon aforesaid by our said lady the queen, to wit, on the —— day of ——, A. D. ——. And this he is ready to verify; wherefore he prays judgment and his damages, &c. to be adjudged to him, &c.

(s) 3 Camp. 245; see plea and notes, *ante*, 11.

In an action by indorsee of a bill of exchange against the acceptor, to a plea that the consideration for the bill was business done for the defendant by W. (the drawer) as an attorney, and that W. was not admitted an attorney, and that the bill was indorsed to the plaintiff after it became due, replication that the said W. was admitted, and other facts.

See *Middleton* v. *Chambers*, 1 M. & G. 97.

STATUTE OF FRAUDS.

7. STATUTE OF FRAUDS.

Replication to a plea of the statute against frauds, that there was a signed guarantee, but not setting it forth. (*a*)

And the plaintiff, as to the said second plea, saith, that at the time of the making of the said promise in the second count mentioned, a memorandum of agreement in writing relating to the said alleged cause of action in the first count mentioned, stating the consideration for the said promise and undertaking of the defendant in the same count mentioned, was signed by the defendant. And this the plaintiff prays may be inquired of by the country, &c.

TO BANKRUPTCY.

8. TO BANKRUPTCY.

To a special plea of bankruptcy, that defendant promised after he became bankrupt. (*b*)

And the plaintiff, as to the plea of the defendant, saith, that after the defendant became and was a bankrupt, as in the said last plea alleged, and before the commencement of this suit, to wit, on &c. he the defendant, in writing signed by the defendant, ratified and confirmed the said promises in the said declaration mentioned, and then promised the plaintiff to pay him the said sums of money in the said declaration mentioned. And this the plaintiff is ready to verify, &c.

To a special plea of bankruptcy, that the certificate was obtained by fraud. (*c*)

And the plaintiff as to the plea of the defendant by him [lastly] above pleaded, says, that the alleged certificate in that plea mentioned was had and obtained by the defendant unfairly, and by the fraud, covin, and misrepresentation of the defendant and others in collusion with him. And this the plaintiff is ready to verify, &c.

To plea in an action by the indorsee of the payee of a promissory note against the maker, that the payee indorsed it after he became bankrupt; replication that the plaintiff *bonâ fide* took the note before the bankruptcy of the payee, without notice, and not by way of fraudulent preference. (*d*)

See *Green* v. *Steer*, 1 G. & D. 500.

To plea of the husband's bank-

And the plaintiff, as to the plea of the defendant by him above pleaded,

(*a*) See form in *Wakeman* v. *Sutton*, 2 Adol. & El. 78; 4 Nev. & Man. 114; and there held that the replication was sufficient, though it did not set forth the guarantee, and see there another form of replication, overruling *Lowe* v. *Elred*, 2 Tyr. 234.

(*b*) See plea and notes, *ante*, 77. *Quære*, whether it would not be better to frame the replication like that to the plea of infancy; *ante*, 426. By the 6 Geo. 4, c. 16, s. 131, the promise must be in writing, and signed by the bankrupt; see 2 C. & P. 528. The following note, "Mr. S. begs to inform Mr. L. that he will take an early opportunity of settling his account, but Mr. S. objects to give his bill. Mr. S. regrets that he has been prevented answering Mr. L.'s letter before. Crescent, Saturday," without either date or signature (the letter referred to not being produced after notice), was held sufficient to make a bankrupt liable under the above section; *Lobb* v. *Stanley*, 13 L. J. R., N. S., Q. B. 117.

(*c*) See form, *Horn* v. *Ion*, 4 Bar. & Adol. 78.

(*d*) See 2 & 3 Vic. c. 29, s. 1. This replication will not be supported by the fact that the payee indorsed the note in blank, before he became bankrupt, to a person who delivered it after the bankruptcy to the plaintiff; *Green* v. *Steer*, 1 G. & D. 499.

says, that before the making of the promises in the declaration mentioned, and before the intermarriage of the plaintiffs, and whilst the said C. was sole and unmarried, to wit, on &c. by a certain indenture then made between the said plaintiff B. of the first part, the said C. by her maiden name of C. H. of the second part, and one T. H. and R. J. of the third part, being a settlement entered into before the intermarriage of the plaintiffs, (which said indenture &c. [*profert*]) the said sums of money in the said declaration mentioned, in consideration of the said intended marriage, and for other considerations, were by the said plaintiff B. and the said plaintiff C. assigned to the said T. H. and R. J. to have, receive and recover the said sums of money, and to hold the same to them the said T. H. and R. J. upon certain trusts in the said indenture mentioned, in favour of the said plaintiff C. and for her sole and separate use during her life, and for the child or children of the said intended marriage; and by the said indenture the plaintiffs appointed the said T. H. and R. J. as their attornies to recover the said sums from the defendant, for the purpose of holding the same upon the trusts aforesaid, as by the said indenture &c., of all of which the defendant afterwards, and before the said plaintiff B. became bankrupt, and before the issuing of the said fiat, to wit, on &c. had notice. And the plaintiff further says that the aforesaid action of the plaintiffs was commenced and is prosecuted in the names of the plaintiffs at the instance and by the direction of the said T. H. and R. J., and by virtue of the power given to them by the said indenture, and for the purpose of recovering, receiving and holding the said sums of money, as the trustees named and appointed in the said indenture, and upon the trusts in favour of the plaintiff C. and of the children of the said marriage, and not for the use or benefit of the said plaintiff B. or of his creditors under the said fiat. And this the plaintiff is ready to verify, &c.

BANKRUPTCY.

ruptcy in action by him and his wife for money lent by the wife *dum sola*, replication that before marriage the money in the declaration mentioned was assigned to trustees upon certain trusts in favour of the wife and the children of the intended marriage, and that the plaintiffs appointed the trustees as their attornies to recover the money, and that the action was commenced in the names of the plaintiffs at the instance of the trustees, for the purposes of the trusts, and not for the use or benefit of the husband, or of his creditors under the fiat. (*f*)

See *Byers* v. *Southwell*, 6 Bing. N. C. 39.

To plea, in action by assignees of bankrupt, that there was no sufficient debt due to the petitioning creditors, replication that other debts were added.

9. INSOLVENCY.

INSOLVENCY.

And as to the plea of the defendant, the plaintiff saith, that the defendant was not, by the said order in the said [last] plea mentioned, discharged

Replication to plea of discharge under Insolvent Act, denying the defendant's discharge. (*g*)

(*f*) See *Parnham* v. *Hurst*, 8 M. & W. 743.

(*g*) See the pleas, *ante*, 82. As to the replication, see 3 Taunt. 237, it should be single. It was held, that where the defendant pleads that he was "duly discharged" under the Insolvent Debtors' Act, and the plaintiff in his replication denies the discharge *modo et formâ*, it is sufficient for the defendant to prove the order of adjudication for his discharge, and it is not necessary to prove the fact of his having filed his petition, although that fact is essential to give the Court jurisdiction; 4 C. & P. 274; 1 Mood. & Mal. 508, S. C. But as the discharge extends only to the debts mentioned in the schedule, it seems that if the debts in the declaration were not included in the schedule that this replication is proper; see *Tyers* v. *Strutt*, 3 Jur. 847. As to the replication in general, see 1 & 2 Vict. cap. 110, s. 91, which, amongst other things, enacts, that the plaintiff may reply generally, and deny the matters pleaded, or may reply any other matter or thing which may show the defendant or defendants not to be entitled to the benefit of that act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded that act and a discharge by virtue thereof specially. The plaintiff cannot reply that the action is carried on for the benefit of his assignees; *Swann* v. *Sutton*, 10 A. & E. 623; 2 P. & D. 533, S. C.

INSOLVENCY.

according to the said statute, of and from the said promises and causes of action in the said declaration mentioned, in manner and form as the defendant hath above in his said last plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea under insolvent act, that the promissory note was given and other debts contracted after plaintiff's discharge under insolvent act. (*l*)

And as to so much of the said plea of the defendant by him [lastly] above pleaded, as relates to the first count of the said declaration, and the sum of £—— parcel of the several sums in the second, third, fourth and last counts of the said declaration mentioned, the plaintiff saith, that the said promissory note, in the said first count of the said declaration mentioned, was made and delivered by the defendant to the plaintiff after the adjudication in the said last plea mentioned, and that the said sum of £—— parcel of the said several sums of money in the said [second, third, fourth and last] counts of the said declaration mentioned, accrued due after the said alleged adjudication. And this the plaintiff is ready to verify. And the plaintiff saith, that he will not further prosecute his suit against the defendant as to the residue of the said several sums of money in the said [second, third and last] counts of the said declaration mentioned; therefore, &c.

Nolle prosequi.

Replication to a plea of discharge under insolvent act, the debt being omitted in the schedule at the plaintiff's request, that defendant wilfully omitted to mention plaintiff's debt in schedule. (*m*)

And the plaintiff, as to the plea of the defendant, by him [secondly] above pleaded, says, that the defendant of his own wrong and of his own sole instance and free-will, and with intent to deceive and defraud the plaintiff in that behalf, omitted the said several debts and causes of action in the declaration mentioned, and all description of the same from and out of his the defendant's said schedule; without this, that the said descriptions were omitted from and out of the said schedule by and with the full knowledge or consent of the plaintiff. (*m*) And this the plaintiff prays may be inquired of by the country, &c.

To plea in action by assignee of insolvent, that insolvent had assigned his debts, in trust for creditors, and the defendant had paid the debt to the assignee, replication that the indenture was executed by the insolvent in insolvent circumstances voluntarily and with intent to petition.

See *Peacock* v. *Harris*, 5 A. & E. 450.

TO TENDER.

10. TO TENDER.

Admission of tender after similiter to general issue, and nil debet to a plea of set-off.

And as to the plea of the defendant as to the said sum of £15 parcel &c. [*sum mentioned in plea of tender*] the plaintiff says, that inasmuch as he cannot deny that the defendant did tender the said sum of £15 parcel &c. as in the said plea alleged, he the plaintiff freely takes and accepts the same out of Court. Now therefore as to the said sum of £15 parcel &c. the plaintiff is satisfied, and will not further prosecute his suit as to that sum.

Denial of tender. (*n*)

And as to the plea of the defendant by him above pleaded as to the said

(*l*) See 2 M. & Sel. 551. See the last note.
(*m*) *Stracey* v. *Blake*, 1 M. & W. 168.
(*n*) See precedents of replications, 3 Wentw. Index, xv. &c.; and see replication, 2 M. & S. 551. As the first writ issued is now, in all cases, considered the commence-

To Tender.

sum of £—— parcel &c. the plaintiff saith, that he ought not to be barred from maintaining his aforesaid action thereof against the defendant to recover further damages than the said sum of £—— parcel &c. in this behalf, * because he saith, that the defendant did not tender or offer to pay to the plaintiff the said sum of £—— parcel &c. in manner and form as the defendant hath above in his said plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c. And as to the said plea of the defendant by him lastly above pleaded the plaintiff saith, that he was not nor is indebted to the defendant in manner and form as the defendant hath in his said last plea above alleged. And this the plaintiff also prays may be inquired of by the country, &c.

Nil debet to the plea of set-off.

A *prior demand* of the debt. (*p*)

Similiter to the general issue as ante, 422. *To plea of tender*, precludi non, *as last form, to the asterisk.*] Because he saith, that the defendant was not always, from the time of making the said promises in the said declaration mentioned, ready and willing to pay the said sum of £—— parcel &c. to the plaintiff, in manner and form as the defendant hath in his said plea above alleged, but on the contrary thereof the plaintiff saith, that after the making of the said promises in the said declaration mentioned, as to the said sum of £—— parcel &c. and after the time when the said causes of action in the said declaration mentioned accrued to the plaintiff in respect thereof, and before the defendant did tender and offer to pay the same as in his said plea in that behalf is above alleged, to wit, on &c. the plaintiff demanded the said sum of £—— parcel &c. of and from the defendant, and then requested him to pay the same unto the plaintiff, but the defendant did not nor would then pay the same or any part thereof unto the plaintiff, but then wholly neglected and refused so to do, and then unjustly detained the same from the plaintiff; by reason whereof the plaintiff then sustained damages by reason of the non-payment of the said sum of £—— parcel &c. in manner and form as he the plaintiff hath above in his said declaration in that behalf alleged. And this the plaintiff is ready to verify; wherefore he prays judgment and his full damages by him sustained, by reason of the non-payment of the said sum of £—— parcel &c. to be adjudged to him, &c.

Replication that a larger sum than that tendered was due on an entire contract and prior demand of that sum. (*q*)

And the plaintiff, as to the plea of the defendant by him above pleaded, says, that before the making of the tender alleged in the said plea, and before and at the time of the demand and refusal hereinafter mentioned, a larger sum than [£10], to wit, the sum of [£30], being part of the money in the declaration mentioned, the said sum of [£30], including the said sum of

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ment of the action, and not the declaration, as formerly was the case, the issuing of the writ need not be replied specially; see 5 B. & Ald. 452.

(*p*) As to this replication, see 8 East, 168; 1 Saund. 33, n. 2; Bul. N. P. 156; 1 Campb. 478; Chit. jun. Contr. 307. A prior demand of a larger sum will not support this plea; see 5 B. & Ald. 630; 1 Esp. Rep. 115; 1 Campb, 181. *Quære*, if a personal demand be not necessary; Ry. & Moody, C. N. P. 360. See a replication to a plea in an action on a bill of exchange, stating that the bill was presented when it fell due, 8 East, 168.

(*q*) Where a sum is due on one entire contract, as on a bill of exchange or promissory note, and the defendant pleads a tender of a smaller sum, the plaintiff may reply that he demanded the larger sum, and that the defendant refused to pay it; *Hesketh* v. *Fawcett*, 11 M. & W. 356; but see *Brandon* v. *Newington*, 3 G. & D. 94.

To Tender. [£10], was due from the defendant to the plaintiff on one entire contract,(r) and that before the making of the said tender in the said plea alleged, to wit, on &c., the plaintiff demanded of the defendant payment of the said sum of [£30] which so then included the said sum of [£10], yet the defendant did not pay to the plaintiff the said sum of [£30] or any part thereof, but then wholly neglected and refused to pay to the plaintiff the said sum of [£30] or any part thereof. And this the plaintiff is ready to verify, &c.

Same replication to action on promissory note. (s) And as to the plea of the defendant by him [secondly] above pleaded the plaintiff says, that before the making of the alleged tender in the said [second] plea mentioned, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than [£12], to wit, [£15], including the said sum of [£12], was due upon and by virtue of the said promissory note; and that before the said tender in the said [second] plea mentioned, to wit, on the —— day of ——, 18—, the plaintiff demanded payment of the said sum of [£15], which so then included the said sum of [£12], yet the defendant did not then pay the said sum of [£15] or any part thereof, but then wholly neglected and refused to pay the said sum of [£15] and every part thereof; and the plaintiff further says, that no set-off or other just cause then existed for non-payment of the said sum of [£15] or any part thereof. And this the plaintiff is ready to verify, &c.

A *subsequent* demand. (t) *Similiter to the general issue, as ante*, 422, *To plea of tender*, precludi non, *as ante*, 431, *to the asterisk.*] Because he saith, that after making of the said tender in the said last plea mentioned, and before the commencement of this suit, to wit, on &c., the plaintiff demanded of and requested the defendant to pay to the plaintiff the said sum of £—— parcel &c. in the said last plea mentioned, but the defendant then wholly refused, and hath thence hitherto wholly refused, to pay the same or any part thereof to the plaintiff. And this the plaintiff is ready to verify; wherefore he prays judgment and his damages by reason of the non-payment of the said sum of £—— to be adjudged to him, &c.

Similiter to general issue, admission of tender, and award of *venire* to try the issue. (u) *Similiter to the general issue, as ante*, 422.] And the plaintiff, inasmuch as he cannot deny but that the defendant did tender and offer to pay to the plaintiff the said sum of £—— parcel &c. in manner and form as the defendant hath above in his said plea in that behalf alleged, freely takes and accepts the same out of Court here, therefore as to the said sum of £—— the plaintiff is satisfied; and in order to try the said issue above joined between the parties aforesaid, the sheriff is commanded that he cause to come here on &c. twelve &c. by whom &c. and who neither &c. to recog-

(r) An allegation that the larger sum was due on account of one and the same of the causes of action is insufficient; for work and labour, for example, is one cause of action, which may arise from various employments or contracts; *Hesketh* v. *Fawcett*, 11 M. & W. 256, 360.

(s) See *Cotton* v. *Godwin*, 7 M. & W. 147.

(t) See the form, 3 Wentw. 180. What subsequent demand is sufficient, 1 Campb. 181. To support this issue the plaintiff must prove a demand of the precise sum tendered; 5 Barn. & Ald. 630.

(u) This replication is proper when the plaintiff admits a tender can be proved, and is prepared to prove more to be due.

nize &c. because as well &c. the same day is given to the parties aforesaid at the same place. To Tender.

And the plaintiff, as to the plea of the defendant by him [secondly] above pleaded [as to the said sum of £—— parcel &c.], saith, that the defendant did not pay to the plaintiff the said sum of £3 : 8s. 2d. in full satisfaction and discharge of the said promise by the defendant so made as aforesaid, in respect of the said sum of £3 : 8s. 2d. and of the damages by him sustained on occasion of the non-performance of the same promise as to the said sum of £3 : 8s. 2d. parcel &c. nor did he the plaintiff accept, have or receive of the defendant the said sum of £3 : 8s. 2d. in full satisfaction and discharge of the said promise, in respect of the said sum of £3 : 8s. 2d. and of the damages sustained by him by reason of the non-performance of the same promise in manner and form as the defendant hath in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c. Replication to plea of payment before action, denying the payment.(x)

And the plaintiff, as to the plea of the defendant by him above pleaded, says, that the defendant by the said H. D. did not pay to the plaintiff, nor did the plaintiff accept or receive of the said H. D. as such agent, the said sum of money in the said plea mentioned, in full satisfaction and discharge of the promises in the said plea in that behalf mentioned, in manner and form as the defendant has therein thereof alleged. And this the plaintiff prays may be inquired of by the country, &c. To plea of payment by drawer of a bill, as defendant's agent, in action by indorsee against acceptor, replication denying such payment. (y).

11. To Payment into Court.

To Payment into Court.

The plaintiff, as to the said plea of the defendant, accepts and takes out of the said Court the said sum of £—— in full satisfaction and discharge of the causes of action in the declaration mentioned. Therefore as to such causes of action the plaintiff is satisfied, and he prays judgment for his costs and charges by him sustained in this behalf, &c. Replication to plea of payment of money into Court on the whole declaration, *accepting* the sum in satisfaction of damages, and praying judgment for costs. (z)

(x) See form of replication in *Webb* v. *Weatherby*, 1 Bing. N. C. 502; 1 Hodges, 39, S. C.

The issue raised by this replication is, whether the money paid was in satisfaction of the debt mentioned in the declaration, and therefore, where, the aggregate of the sums stated in the declaration being £30, the defendant pleaded payment of divers sums to the amount of the monies in the declaration, and proved payments to the amount of £92, but the plaintiff proved a cause of action to the amount of £107; it was held that the plaintiff was not bound to new assign, but was entitled to a verdict for the balance; *Freeman* v. *Crafts*, 4 M. & W. 4; see also *James* v. *Lingham*, 5 Bing. N. C. 553; 7 Scott, 703, S. C.; *Kenningham* v. *Alison*, 2 Dowl. N. S. 658; and *Dite* v. *Hawker*, 1 Dowl. & L. 189; but see *Rogers* v. *Custance*, 1 Q. B. Rep. 77, as to when a new assignment may be necessary. Where the plea is, that the defendant paid, and the plaintiff accepted, monies in full satisfaction, a replication denying the acceptance puts the payment as well as the acceptance in issue; *Ridley* v. *Tindall*, 7 A. & E. 134.

(y) See *Bennison* v. *Thelwell*, 7 M. & W. 512.

(z) "The plaintiff, after delivery of a plea of payment of money into Court, shall be at liberty to reply to the same by accepting the sum so paid into Court, in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and in case of nonpayment thereof within forty-eight hours, to sign judgment for his costs so taxed: or the plaintiff may reply 'that he has sustained damages,' [*or* 'that the defendant was and is indebted to him,' *as the case may be*,] 'to a greater amount than

PAYMENT INTO COURT.

The like, where the plea is only pleaded to a part of the causes of action.

Similiter to the general issue, as ante, 422.] And the plaintiff, as to the plea of the defendant by him above pleaded, as to the said sum of £—— parcel &c. accepts and takes the said sum of £—— out of the said Court here in full satisfaction and discharge of the said causes of action as to the said sum of £—— parcel &c. Therefore as to such causes of action the plaintiff is satisfied. (*a*)

Replication, that plaintiff hath sustained greater damages.

The plaintiff saith, [*or if the plea be confined to a part only of the causes of action, say,* " the plaintiff, as to the plea of the defendant by him above pleaded as to the said sum of £—— parcel &c. saith,"] that he ought not to be barred from further maintaining his aforesaid action against the defendant, [as to the said sum of £—— parcel &c.] because he saith, *that he hath sustained damages to a greater amount than the said sum of* £—— in respect of the causes of action in the declaration mentioned [*or* " as to the cause of action in the introductory part of that plea mentioned."] And this the plaintiff prays may be inquired of by the country, &c.

Nolle prosequi as to residue of the declaration where money is accepted in part satisfaction,

And as to the residue of the declaration the plaintiff says, that he will not further prosecute against the said defendant in respect of the residue of the causes of action in the declaration mentioned, therefore as to such causes of action let the defendant be acquitted and go thereof without day, &c.

TO ACCORD AND SATISFACTION.

12. TO ACCORD AND SATISFACTION.

To plea of accord and satisfaction, denial of the delivery of the bond, &c. (*b*)

And the plaintiff, as to the plea of the defendant by him above pleaded, saith, that the defendant did not deliver [*or if a bond be pleaded, say,* " make and seal, and as his act and deed deliver"] to the plaintiff, the said pipe of wine, [*or* " the said writing obligatory,"] in the said plea mentioned, in full satisfaction and discharge of the said several promises in the said declaration mentioned, in manner and form as the defendant hath above in his said plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

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the said sum,' and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit."—Reg. Gen. T. T. 1 Vict. It has been suggested that in " debt" damages ought to be prayed in respect of the detention of the debt; *Price* v. *Duggan*, 2 M. & G. 642, note (*b*). The acceptance by the plaintiff of the smaller sum is not of itself sufficient evidence that no more was due, so as to entitle the defendant to enter a suggestion under a Court of Requests Act, giving jurisdiction over debts to a certain amount; *Jorden* v. *Berwick*, 9 M. & W. 3.

(*a*) Where money paid into Court is taken out in satisfaction of part only of the plaintiff's demand, there being other issues upon which the parties are proceeding to trial, the plaintiff is not entitled to tax his costs under R. T. T. 1 Vict.; *Cauty* v. *Gill*, 4 M. & G. 907. But if a *nolle prosequi* be entered as to the residue of the declaration, this replication should conclude with a prayer of judgment as to costs as in the last form.

(*b*) See the forms, 1 Lil. Ent. 105, 106, 499; Plead. A. 246; Morg. Prec. 233; 3 Wentw. 135, and *id.* Index, vi. It was formerly usual to protest the delivery and traverse the acceptance, where there had in fact been a delivery, but no acceptance in satisfaction; but as no protestation is now allowed, the above form is in all cases correct, although the plaintiff may, according to the case of *Webb* v. *Weatherley*, 1 Bing. N. C. 502, traverse both the delivery and acceptance.

13. To Award and Arbitrament.

To a plea of arbitrament, denying the award. (*b*)

And the plaintiff, as to the plea of the defendant by him above pleaded, saith, that the said arbitrator did not make any such award of and concerning the premises, in manner and form as the defendant hath above in his said plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To a plea of delivery of a bill of exchange accepted on account, replication that the bill was dishonoured. (*c*)

And as to the plea of the defendant by him [secondly] above pleaded, the plaintiff says, that the said bill of exchange in the said [second] plea mentioned bore date on a certain day and year therein in that behalf mentioned, to wit &c. and that the same became due and payable long before the commencement of this suit. And the plaintiff further saith, that after the said bill became due and payable according to the tenor and effect thereof, and before the commencement of this suit, to wit &c. the said bill was shown and presented to the defendant for payment thereof, but that he the defendant did not nor would, when he was so requested as aforesaid, or at any other time before the commencement of this suit, pay the said sum of money in the said bill specified, or any part thereof, but wholly neglected and refused so to do, and the said sum of money in this bill mentioned at the time of the commencement of this suit was and still is wholly due and unpaid, and the plaintiff at the time of the commencement of this suit was and still is the holder of the said bill. And this the plaintiff is ready to verify, &c.

14. To Judgment Recovered.

Nul tiel record to a plea of judgment recovered in *same* Court. (*e*)

And the plaintiff, as to the plea of the defendant by him above pleaded, saith, that there is (*d*) not any record of the said recovery in the said plea mentioned remaining in the said Court of our said lady the queen, before the queen herself, [*or in C. P.* "of the Bench aforesaid,"] at Westminster aforesaid, in manner and form as the defendant hath above in his said plea alleged. And this he the plaintiff is ready to verify* when, where and in such manner as the Court here shall order, direct or appoint, and because the Court of our said lady the queen now here, [*or in C. P.* "the justices of the Bench,"] will advise themselves upon the inspection and examination of the said record, by the defendant in his said plea alleged, a day is given

(*b*) See the forms of replications, 3 Wentw. Index, viii.; Clift. Ent. 195; see also 1 Saund. 103 b.

(*c*) To a plea of the delivery of a bill of exchange, drawn by the plaintiff and accepted by the defendant, and delivered to the plaintiff, who then "accepted and received the same in discharge," and afterwards indorsed it to a person unknown, who is entitled to sue the defendant thereon, the plaintiff cannot reply that he did not accept and receive the bill in *satisfaction and discharge* of the sum to which it is pleaded; *Emblin* v. *Dartnell*, 1 D. & L. 591.

(*d*) This is sufficient, without averring that there was no record at the time of the plea pleaded.

(*e*) See the forms, Tidd's Prac. Forms, 6th edit. 308; 1 Rich. C. P. 206; 2 Rich. C. P. 20; 3 Wentw. Index, ix.; 1 Saund. 92, n. 3, and Tidd's Prac. 9th edit. 717, 742. *Semble*, that if the judgment has been set aside, this is the proper replication, and that if the plaintiff replied specially that fact, it would amount to a special plea of nul tiel record; *per* Tindal, C. J., *Nash* v. *Swinburne*, 3 M. & G. 855.

To Judgment Recovered.

to the parties aforesaid, before our said lady the queen, [*or in C. P.* "before the justices of the Bench,"] at Westminster aforesaid, until —— to hear the judgment of the said Court thereupon, for that the said Court of our said lady the queen now here are not yet advised thereof, &c.

The like to a plea of judgment recovered in *another* Court. (*f*)

Same as the above form to the asterisk.] And hereupon the defendant is commanded that he have the said record before our said lady the queen, [*or in C. P.* "before the justices of the Bench,"] at Westminster, on ——, and that he fail not at his peril, the same day is given to the plaintiff here &c.

To plea of judgment recovered, denying that it was for the same causes of action. (*g*)

And the plaintiff, as to the plea of the defendant by him above pleaded, saith, that the said several promises in the said declaration mentioned were not, nor was any or either of them, the same identical promises as those or any of those in the said plea mentioned, and for and in respect whereof the said judgment in the said plea mentioned was recovered, in the manner and form as the defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

15. To Release.

To Release.

To a plea of release *non est factum*. (*h*)

Commencement as ante, 422, second form.] That the said writing of release in the said last plea mentioned was not nor is the deed of him the plaintiff. And this the plaintiff prays may be inquired of by the country, &c.

To plea of release, replication, setting out a deed of composition, that the release was subject to a defeasance on non-payment of promissory notes given as a composition, and averring default in payment. (*i*)

See replication, *Nevill* v. *Boyle*, 11 M. & W. 26.

(*f*) See the forms and the law referred to in the note to the last form, and 1 Rich. C. P. 203; Morg. 253. Plaintiff may pray that the Court will inspect the record without giving defendant an opportunity to rejoin by traversing the record; 7 Taunt. 30; 2 Marsh. 354, S. C.; 2 B. & P. 302; 1 Saund. 92 a.

(*g*) That plaintiff may reply this, see 3 B. & C. 235; 6 T. R. 607, and see form of new assignment *post;* and see observations in 1 Adol. & E. 217—223.

To plea that plaintiff had impleaded the defendant for the same causes of action, and judgment given for the defendant, replication admitting the judgment &c. that defendant, *de injuriâ absque residuo causæ*, &c., see *Palmer* v. *Temple*, 1 P. & D. 379. To a plea of foreign attachment in the Lord Mayor's Court it is not a good replication that no notice was given to the defendant in that Court; *M'Grath* v. *Hardy*, 4 Bing. N. C. 782; 6 Dowl. 749, S. C.

(*h*) See the forms, 3 Wentw. Index, xii.; and a different form, 2 Rich. C. P. 71.

(*i*) The defendant cannot rejoin to this plea that before such default the defendant delivered to the plaintiffs another promissory note, which was accepted by them in lieu and satisfaction of the said first note, as such a rejoinder would be a departure from the plea, and if the facts constituted a defence, they should be fully pleaded in the first instance, because such a defence is founded upon a fresh agreement made at the time when the first note became due; *Nevill* v. *Boyle*, 11 M. & W. 26. See replication to plea of release, setting out deed of composition whereby the defendant covenanted to effect an insurance of his life, with a proviso in case of neglect or refusal that the indenture should be void to all intents and purposes, and effect of such breach, *Hyde* v. *Watts*, 12 M. & W. 254; 1 D. & L. 479, S. C.

See replication, *Walmesley* v. *Cooper*, 11 A. & E. 216; 3 P. & D. 148, S. C.

To plea of release, replication setting out deed of composition by creditors, and averring that the plaintiff executed it after a day named in the deed, whereby the deed was of no avail to him. (*k*)

And as to the plea of the defendant by him [lastly] above pleaded, the plaintiff says, that he the plaintiff entered into the said agreement in the last plea mentioned, and accepted and received the said sum therein mentioned, as in that plea mentioned, at the request, and with the full knowledge, privity and consent of the defendant, and upon the express agreement and understanding between the plaintiff and the defendant, that the plaintiff should not thereby discharge the defendant from his said liability upon the guarantee in the said declaration mentioned, but that the same was to remain and be in full force and effect against the defendant, and that the rights of the plaintiff against the defendant in respect of the said sum of £—— should be reserved to the plaintiff, and not at all altered, varied, or affected by reason of the said arrangement, or of the plaintiff accepting and receiving the same. And this the plaintiff is ready to verify, &c.

To plea of acceptance of composition from principal, in action against surety, replication that the plaintiff entered into it with the knowledge of and upon the agreement that it should not discharge the defendant. (*l*)

Commencement as ante, 422, second form.] Saith, that the said supposed writing of release in the said plea mentioned was had and obtained from the plaintiff by the fraud and covin of the defendant. And this the plaintiff is ready to verify, &c.

To a plea of release, that it was obtained by fraud. (*m*)

16. To Set-off.

To Set-off.

Commencement as ante, 422, second form.] Saith, that he the plaintiff was not nor is indebted to the defendant in manner and form as the defendant hath

To a plea of set-off, *nil debet*. (*n*)

(*k*) Where to a plea of release, the plaintiffs replied, setting out on oyer the deed of release, by the recital in which it appeared that the intention of the parties was to release only the sums set opposite to their respective names in the shedule thereto annexed; and the replication averred that the money so released was due upon other and different contracts than those mentioned in the declaration, *semble* that the replication was bad, as amounting to an argumentative denial of the release mentioned in the plea; *Wilkinson* v. *Lindo*, 7 M. & W. 81.

(*l*) This replication was held good, as it did not appear that the reservation of the plaintiff's right against the defendant was unknown to the other creditors; *Davidson* v. *M'Gregor*, 8 M. & W. 755. See "*Rejoinder*," *post*. To plea of release of one joint maker of a promissory note, the plaintiff cannot reply that the release was at the defendant's request, and that he promised to remain liable on the note, as that would be setting up a parol contract to avoid the release; *Brooks* v. *Stuart*, 1 P. & D. 615. To plea averring execution of deed of composition by the manager of a banking company (the plaintiffs) as follows, that "A., so being such manager as aforesaid, executed the said indenture as such manager as aforesaid for and in behalf of the said co-partnership, and duly authorised in that behalf, and which execution thereof by A. as such manager as aforesaid, hath been since duly ratified, confirmed, acknowledged and acted upon by the co-partnership, with the knowledge, assent and concurrence of the several parties to the indenture," a replication that the said A. did not execute the said deed as such manager for and on behalf of the said co-partnership, nor was the said A. at any time authorised in that behalf *modo et formâ* &c. is good, as the several allegations in the plea traversed by the replication constitute only one defence; *Bell* v. *Tuckett*, 3 M. & G. 785.

(*m*) Replication that release was obtained by duress, 2 Rich. C. P. 73.

(*n*) A plaintiff may still *reply* "*nil debet*" to a plea of set-off, notwithstanding the rules of H. T. 4 Will. 4, II. 2 & 3; but if he reply "*never indebted*," he cannot give payment in evidence under that plea, see *Brown* v. *Daubeny*, 1 Har. & W. 646; 4 Dowl. 585, S. C.; *Jackson* v. *Robinson*, 8 Dowl. 622; and must reply specially the Statute of Limitations, *post*, 439. See the form, Morg. 251. Where

To Set-off.

above in his said last plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea of set-off, in action by assignees of a bankrupt, alleging a *loan and credit* of monies to the bankrupt, replication denying the loan. (*o*)

And the plaintiffs, as to the plea of the defendant by him above pleaded, say, that the defendant did not lend or advance a large sum of money, or any sum of money whatever to the said E. F. [*the bankrupt*] in manner and form as the defendant has in his said plea in that behalf above alleged. And this the plaintiffs pray may be inquired of by the country, &c.

In action by assignees of a bankrupt for the price of a phæton, to plea of set-off in respect of a bill of exchange drawn by H. and accepted by the bankrupt and indorsed to the defendant, replication that after the bill was dishonoured, H. indorsed it to the defendant without consideration, in trust that the defendant should purchase the phæton of the bankrupt, hand it over to H. and fraudulently attempt to set off the bill against the price of the phæton. (*p*)

And the plaintiffs, as to the plea of the defendant by him [secondly] above pleaded, say, that the said R. S. before he became bankrupt and before any of the times in the declaration mentioned, was indebted to the said W. H. [*the drawer*] in the sum of £——, and in consideration thereof had accepted the said bill of exchange in the [second] plea mentioned as therein alleged; and that after the said bill of exchange had become due and dishonoured, the said W. H. indorsed and delivered the same to the defendant without any consideration or value whatever for such indorsement or delivery, in order that the defendant might hold the same as trustee thereof for the said W. H., and on the agreement, terms and understanding that the defendant should purchase the said phæton from the said R. S. on the terms in the declaration mentioned, and afterwards hand over the said phæton to the said W. S., but instead of such payment for the same as therein alleged to have been agreed upon between the said R. S. and the defendant, should fraudulently attempt to set off the amount of the said bill of exchange against the price of the said phæton, and that the defendant was not at any time in the [second] plea mentioned the *bonâ fide* holder or indorsee of the bill of exchange therein mentioned. And this the plaintiffs are ready to verify, &c.

To a plea of set-off on a recognizance enrolled and simple contract, *nul tiel record*, and *nil debet*. (*q*)

And for a replication in this behalf, as to so much of the said plea of the defendant by him secondly above pleaded as relates to the said sum of £——, therein alleged to be due and owing from the plaintiff to the defendant on the said recognizance in that plea mentioned, the plaintiff saith, that there is not any such record of the said supposed recognizance in the said plea mentioned remaining of record in the said Court of our said lady the queen, before the queen herself, [*or in C. P.* " of the Bench aforesaid,"] in manner and form as the defendant hath above in his said plea in that behalf

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in assumpsit for goods sold and delivered, the defendant pleaded a set-off for more money due to him from the plaintiff, and plaintiff replied that the goods were to be paid for in *ready money*, the replication was holden bad on demurrer, as being no answer to the plea; 1 East, 375. The replication must not put in issue both the *amount* of the credits, &c. and the nature of the mutual claims, as it would be bad for duplicity; *Hulme* v. *Muggleston*, 3 M. & W. 30.

(*o*) See *Alsager* v. *Currie*, 11 M. & W. 14, where this replication was held sufficient.

(*p*) See *Lackington* v. *Combes*, 6 Bing. N. C. 78.

(*q*) As to this replication, see 1 East, 369. The replication of *nul tiel record* is unnecessary and improper, unless the plea state the recognizance is enrolled of record; if it does not, *nil debet* is sufficient; 1 B. & Ald. 153.

To Set-off.

alleged, and this he the plaintiff is ready to verify when, where and in such manner as the said Court shall here direct and award. [*Here insert the time for the production of the record in the same or another Court as in the forms, ante, 436, and then proceed as follows:*] And the plaintiff, as to the residue of the said plea of the defendant, (*r*) saith, that he was not nor is indebted to the defendant in the said sum of £—— or any part thereof, in manner and form as the defendant hath above in that part of his said plea in that behalf alleged; and this the plaintiff prays may be inquired of by the country, &c. And the defendant doth the like, therefore &c. [*Award of venire, as ante, 432.*

Replication of payment of the claim, to a plea of set-off. (*s*)

And the plaintiff, as to the plea of the defendant by him [lastly] above pleaded, says, that after the said debts and causes of set-off in the said *last* plea mentioned, accrued and became due from the plaintiff to the defendant, and before the commencement of this suit, to wit, on the —— day of ——, A. D. ——, he the plaintiff paid to the defendant divers monies amounting to a large sum, to wit, the sum of £——, and equal to all the monies in the said *last* plea mentioned, in full satisfaction and discharge of those monies and the defendant's cause of set-off in respect thereof, which payment the defendant then accepted in such full satisfaction and discharge as aforesaid. And this the plaintiff is ready to verify, &c.

Statute of Limitations, to a plea of set-off. (*t*)

Commencement as ante, 422, second form.] Saith, that the said several alleged debts and causes of set-off in the said [last] plea mentioned did not nor did any or either of them arise or accrue to the defendant at any time within six years next before the commencement of this suit, in manner and form as the defendant hath above in his said [last] plea in that behalf alleged. And this the plaintiff is ready to verify, &c.

To plea to action for goods sold, that they were sold with the plaintiff's privity, by his factor, as his goods, and that the defendant had a set-off against the as his goods.(*u*)

And the plaintiff, as to the plea of the defendant by him above pleaded, says, that the goods in the above plea mentioned were not with the knowledge, privity or consent of the plaintiffs sold to the defendant by the said W. H. in his the said W. H.'s name, as the true and sole owner thereof, and as and for his the said W. H.'s own goods, in manner and form as the plaintiff has above in his said plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

factor, replication that the goods were not sold with the plaintiff's privity by the factor

(*r*) The answers to the whole of the plea of set-off must be included in one plea; see *Briscoe* v. *Hill*, 10 M. & W. 735.

(*s*) Since the new pleading rules, it has been held that the plaintiff cannot give payment in evidence under the replication, "*never indebted*," but must reply specially, see *supra*, note (*n*); *quære* whether such evidence would not be admissible under the replication "*nil debet*."

(*t*) In *Chappel* v. *Durston*, 1 Crompt. & Jerv. 1; *Gale* v. *Capern*, 1 Adol. & El. 103; 3 Nev. & Man. 863, it was fully established that the Statute of Limitations must be replied specially to a plea of set-off, and cannot be taken advantage of under the general replication of *nil debet*. The above form of replication is sufficient; 2 Str. 1271.

(*u*) This is a good replication, but the plaintiff might reply the sale by himself as owner, *absque hoc*, that the agent sold with the plaintiff's privity; per Littledale, J., *Pigeon* v. *Osborn*, 4 P. & D. 346; 9 Dowl. 511, S. C.

To Court of Conscience Act.

17. To Court of Conscience Act.

To a plea of Court of Conscience Act, defendant indebted in more than 40*s.* (*x*)

Commencement as ante, 422, *second form.*] Saith, that the defendant at the time of the commencement of the said action of the plaintiff was indebted to the plaintiff upon and by virtue of each and every of the said several promises in the said declaration mentioned, in a larger sum than the sum of 40*s.*, to wit, in the said sum of £——, in each and every of the said respective counts of the said declaration mentioned, in manner and form as he the plaintiff hath above in his declaration in that behalf complained against the defendant. And this the plaintiff prays may be inquired of by the country, &c.

Replication that defendant was not liable to be summoned.

See form, Chit. J. Precedents, 289.

To plea in an action by purchaser against vendor, that the defendant delivered abstract, but plaintiff did not take objections to title, replication denying averments in plea. (*y*)

And the plaintiff, as to the plea of the defendant by him [seventhly] above pleaded, says, that although true it is that the defendant did within [twenty days] after the said sale deliver at his own expense to the solicitors of the plaintiff an abstract of the title to the said [several reversionary estates and interests], yet that the defendants did not by or in or upon the said abstract disclose and show to the plaintiff a good and sufficient title to the said [reversionary estates and interests] according to the effect and meaning of the said conditions of sale; and that he the plaintiff did, by his solicitors, within [ten] days after the delivery by the defendant of the said abstract of title in the said seventh plea mentioned, take objections to the said title in writing, according to the true meaning of the said conditions of sale, and that such objections were within such period of [ten] days aforesaid taken and communicated to the defendant by the plaintiff. And this the plaintiff prays may be inquired of by the country, &c.

To Statute of Limitations.

18. To Statute of Limitations.

To plea of *non assumpsit infra sex annos*, that defendant did undertake, &c. (*z*)

Commencement as ante, 422, *second form.*] Saith, that the defendant did, within six years next before the commencement of this suit, promise in manner and form as the plaintiff hath above thereof complained against him. And this the plaintiff prays may be inquired of by the country, &c.

(*x*) See the forms of replications, 3 Wentw. Index, xviii.; Com. Dig. County, C. 8.

(*y*) See *Smith* v. *Tanner*, 1 M. & G. 802.

(*z*) Although the plea of the statute does not conclude with a verification, the plaintiff cannot add the similiter to the plea, but must reply in this or the next form; *Wheatley* v. *Williams*, 1 M. & W. 533; *Spong* v. *Wright*, 9 M. & W. 629. See form of replication, 1 Rich. C. P. 149; 2 Rich. C. P. 34; Morg. 218. Formerly, if the time when the process was issued was material, it must have been replied specially, *post*, 441, note (*s*). So if the infancy of the plaintiff, &c. be material; 6 T. R. 193; 2 Saund. 127, n. 6. Where the defendant has promised within six years, it does not, as was originally supposed, operate by drawing down the *original* promise, but the plaintiff recovers on the *new* promise, and an acknowledgment or part payment before action is evidence of such new promise, and gives a new right of action; but for this reason, an acknowledgment or part payment after action will not take a debt out of the statute; *Bateman* v. *Pinder*, 2 G. & D. 790.

Commencement as ante, 422, second form.] Because he saith, that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the said plaintiff within six years next before the commencement of this suit [*following the language of the plea*], in manner and form as the plaintiff hath above complained against the defendant. And this the plaintiff prays may be inquired of by the country, &c.

To a plea of *actio non accrevit infra sex annos*, that the cause of action did accrue, &c. (*a*)

Commencement as ante, 422, second form.] Saith, that at the time when the said several causes of action in the said declaration mentioned and each and every of them (*c*) did accrue to the plaintiff, the plaintiff was in parts beyond the seas, and that the plaintiff afterwards, to wit, on &c. returned from the said parts (*c*) beyond the seas into this kingdom, and which said return of the plaintiff was his first return into this kingdom from the said parts beyond the seas after the accruing of the said causes of action and every of them (*c*) to the plaintiff, and that the plaintiff commenced this action against the defendant within six years next after the plaintiff's first return into this kingdom from beyond the seas after the accruing of the said several

That *plaintiff was abroad*, and the action was commenced within six years after his return. (*b*)

A verbal acknowledgment is insufficient; *Maghee* v. *O'Neil*, 7 M. & W. 531.

Where unappropriated sums have been paid by the defendant to the plaintiff on account, the latter is entitled to apply them in discharge of debts to which the defendant has pleaded the statute; *Williams* v. *Griffith*, 5 M. & W. 300. But such payments cannot be considered as payments on account to take out of the statute a balance of a debt after application by the plaintiff of such payment to a portion of the debt, where there are other debts unpaid for a less period than six years; *Mills* v. *Fowkes*, 5 Bing. N. C. 455. Where A. has an account against B., some of the items of which are more than six years old, and B. has a cross account against A., and they meet and go through both accounts, and a balance is struck in A.'s favour, this amounts to an agreement to set off B.'s claim against the earlier items of A.'s, out of which arises a new consideration for the payment of the balance, and takes the case out of the operation of the statute; *Ashby* v. *James*, 11 M. & W. 542; see *Clark* v. *Alexander*, 13 L. J. R., N. S., C. P. 33. The existence of items within six years in an open account will not, since Lord Tenterden's act (9 Geo. 4, c. 19, s. 1), operate to take the previous portion of the account out of the statute; *Cottam* v. *Partridge*, 4 M. & G. 271. Payment of interest due on a specialty by one will take the case out of the statute as to a collateral simple contract debt due from that one and another, *Dowling* v. *Ford*, 11 M. & W. 329; and in an action on a promissory note, where, to rebut a plea of the statute, the plaintiff proved payment on account of the note within six years, and a parol admission by the party paying that he had made the payment, it was held that this admission was rightly received in evidence to corroborate the direct proof of the fact of payment, as the statute 9 Geo. 4 merely excludes an acknowledgment "by words *only*;" *Bevan* v. *Gething*, 3 G. & D. 59. *Quære*, whether a promise in writing given by the maker of a promissory note to the payee can be made available to defeat the statute in an action by a subsequent party to the note; *Cripps* v. *Davis*, 12 M. & W. 159. A payment made by one partner, after the dissolution of the partnership, on account of a partnership debt, and after six years have elapsed without any acknowledgment of the debt, is sufficient to take the case out of the operation of the Statute of Limitations as against the other partner, though the jury find that the payment was fraudulently made against his consent, and in concert with the creditor to revive the debt; *Goddard* v. *Ingram*, 3 G. & D. 46.

(*a*) This form is adopted when in fact the action was commenced within the six years. Formerly, if the plaintiff relied on the issuing of the writ, it must have been replied specially, unless indeed the defendant in his plea averred that the causes of action did not accrue within six years "*before the commencement of this suit*;" 5 B. & Ald. 452; 1 D. & R. 27, S. C. This plea will suffice in an action at the suit of an administrator, when the cause of action did not accrue till after taking out administration; 5 B. & A. 204. See the note to the last form, and a form, 1 Rich. C. P. 149; Plead. A. 452.

(*b*) See the form, 3 Wentw. 205. This replication is founded on the statute of 21 Jac. 1, c. 16, s. 7, see 2 Saund. 121 a, b. See the note to the next form but one. See a form where the writ was issued out with continuances six years after the return, 4 B. & C. 625; 7. D. & R. 25, S. C.

(*c*) It seems best to insert these words, though the omission of them is, if at all, only objectionable on special demurrer; 4 B. & C. 634; 7 D. & R. 25, S. C.

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causes of action aforesaid, or any of them, unto the plaintiff. And this the plaintiff is ready to verify, &c.

The like in another form.

Saith, that at the time when the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the plaintiff, he the plaintiff was in parts beyond the seas, and that the plaintiff did not at any time from the time the said causes of action accrued, and each and every of them did accrue, until within six years of the day of the commencement of this suit, come or return into this kingdom. And this the plaintiff is ready to verify, &c.

That *defendant was abroad*, and the action was commenced within six years after his return. (*d*)

Commencement as ante, 422, *second form.*] Saith, that the defendant, before and at the time when the said several causes of action in the said declaration mentioned accrued to the plaintiff, was in parts beyond the seas, and that the defendant afterwards, to wit, on &c. returned from the said parts beyond the seas into this kingdom; which said return of the defendant was his first return into this kingdom from the said parts beyond the seas after the accruing of the said several causes of action and each and every of them. (*e*) And the plaintiff further saith, that he the plaintiff commenced his said action against the defendant within six years after his the defendant's first return into this kingdom after the accruing of the said several causes of action and each of them. And this the plaintiff is ready to verify, &c.

Replication that the plaintiff issued writs of summons against the defendant under the 2 Will. 4. c. 39, s. 10.

See *Williams* v. *Williams*, 10 M. & W. 174.

Replication, in an action by executors, to a plea of statute of limitations, that testator commenced an action within six years, which abated by death, and that within a year after, the present action was commenced by plaintiffs as executors. (*f*)

And the plaintiffs, as to the plea of the defendant by him [secondly] above pleaded, say, that heretofore and in the lifetime of the said J. H., to wit, on the —— day of ——, A. D. ——, the defendant in this suit, being indebted to the said J. H. in respect of the said several promises and causes of action in the said [first, third, fourth and fifth counts of the said] declaration mentioned, the said J. H. for the recovery of his damages sustained on occasion of the non-performance by the defendant of the said several promises in the said [first, third, fourth and fifth counts of the said] declaration

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(*d*) See the forms, 1 Wentw. 327. This replication is founded upon the 4 Ann. c. 16, s. 19, and not on the 21 Jac. 1, c. 16. See 2 Saund. 121 a, b. If the defendant were in this kingdom at the time the cause of action accrued, this replication will be insufficient, for when once the Statute of Limitations begins to run, no subsequent disability prevents its operation; 1 Wils. 134; 4 T. R. 310; and see 19 Ves. 200. See 1 Show. 99; 1 Salk. 420; Carth. 137; and see the authorities and notes collected in 1 Chit. Col. Stat. 705; and 4 Bing. 686.

(*e*) See 4 B. & C. 625; 7 D. & R. 25, S. C.; *supra*, n. (*d*).

(*f*) See *Waters* v. *Thanet*, 2 Q. B. Rep. 757; 2 G. & D. 167, S. C.; and see 2 Saund. 64, notes; 1 Wentw. 257; 3 Wentw. 204, 294; 1 Salk. 28; 2 Ld. Raym. 1101; Bul. N. P. 150; 3 East, 409; Tidd, 9th edit. 28. See form of rejoinder *post*. It is no answer to a plea of the Statute of Limitations, that after the cause of action accrued, and after the statute had began to run, the debtor within the six years died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted; *Rhodes* v. *Smethurst*, 4 M. & W. 42; affirmed on error, 6 M. & W. 351.

The 52 Geo. 3, c. 165, s. 54 (a former insolvent act), which gave creditors a remedy against the future effects of insolvents, discharged under that act, did not prevent the operation of the Statute of Limitations; *Browning* v. *Paris*, 7 Dowl. 398.

mentioned, sued and prosecuted out of the Court of our said lady the queen, before the queen herself, a certain writ of our lady the queen, called a writ of summons, bearing date the day and year last aforesaid, directed to the defendant, whereby he was commanded by our lady the queen, within eight days after the service of that writ on him, inclusive of the day of such service, to cause an appearance to be entered for him in the said Court in an action on promises at the suit of the said J. H., and the defendant was thereby required to take notice that in default &c. [*following the language of the writ,*] which said writ was so sued out and prosecuted as aforesaid out of the said Court by the said J. H. with intent that the defendant might by virtue thereof appear in the said Court to answer him in the said action, and that the said J. H. might thereupon declare against him upon and for the said several promises and causes of action in the said [first, third, fourth and fifth counts of the said] declaration in this suit above mentioned, and a true copy of which said writ, with all proper indorsements thereon, was, within four calendar months from the date of the said writ, and in the lifetime of the said J. H., to wit, on the —— day of ——, A. D. ——, duly served on the defendant; and the defendant afterwards, to wit, on the —— day of ——, A. D. ——, appeared in the said Court to answer the said J. H. according to the tenor of the writ aforesaid. And thereupon the said J. H., according to the said intent, afterwards, to wit, on &c. by C. D. his said attorney, declared against the defendant in an action on promises, upon and for the non-performance of the same identical promises in the said [first, third, fourth and fifth counts of the said] declaration in this action above mentioned. And the defendant thereupon afterwards, to wit, on &c. in the year last aforesaid, pleaded to the said declaration of the said J. H., and the said suit was duly continued, depending and undetermined in the said Court until the said J. H. afterwards, and while the said suit was pending and undetermined, and within six years next before the commencement of this suit of the plaintiffs, as executors as aforesaid, against the defendant, to wit, on the —— day of ——, A. D. ——, died; and thereupon the said suit of the said J. H. was thereby then abated, and the said proceedings therein ceased, and were and are wholly determined and ended. And the plaintiffs, as executors as aforesaid, further say, that they the plaintiffs, as executors as aforesaid, afterwards, and within a reasonable time next after the death of the said J. H., that is to say, within a year after his death, to wit, on the —— day of ——, A. D. ——, for the recovery of the damages sustained by them as executors as aforesaid, by reason of the non-performance of the said promises in the said [first, third, fourth and fifth counts of the said] declaration in this action above mentioned, sued and prosecuted out of the said Court of our said lady the queen, before the queen herself, a certain other [writ] of our said lady the queen, called a writ of summons, bearing date the day and year last aforesaid, directed to the defendant, whereby he was commanded &c. [*recite the writ as before*], which said last mentioned writ was so sued out and prosecuted by the plaintiffs, executors as aforesaid, with intent to implead the defendant upon and for the said several causes of action in the [first, third, fourth and fifth counts of the] said declaration in this suit above mentioned, and to cause him to appear in the said Court here, and upon such appearance to declare against the defendant for the said several

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causes of action in [those counts of] the declaration mentioned. And the plaintiffs, executors as aforesaid, further say, that afterwards, to wit, on &c. the defendant appeared in the said last-mentioned action, according to the same writ, and the plaintiffs, as executors as aforesaid, according to their said intent, by T. G. their attorney, afterwards, to wit, on &c. declared against the defendant in manner and form aforesaid. And the plaintiffs, executors as aforesaid, aver that the said several causes of action in the said [first, third, fourth and fifth counts of the said] declaration in this suit mentioned, accrued to the said J. H. within six years next before the suing out of the said first-mentioned writ by the said J. H. as aforesaid. And this the plaintiffs, executors as aforesaid, are ready to verify, &c.

Replication, that the accounts were due between merchants. (*g*)

And as to the said [second] plea of the defendant, the plaintiff says, that the said causes of action in the declaration mentioned were and are and relate to certain accounts still open and unsettled concerning the trade of merchandize between merchant and merchant, that is to say, between the plaintiff and the defendant as merchants, and that the plaintiff and the defendant were merchants during the time the said accounts and matters arose and were subsisting between them. And this the plaintiff is ready to verify, &c.

Other replications to Statute of Limitations.

The other replications to the Statute of Limitations may be the plaintiff's infancy, 2 Saund. 118 ; Lutw. 243 ; or that he obtained a judgment, which was arrested or reversed, and that he now sues within a year after such reversal, &c., 2 Saund. 63 h. As to the replication in an action against husband and wife, see 1 B. & C. 248; 2 D. & R. 563, S. C.; Tidd, 9th ed. 1250. See the notes 1 Chit. Col. Stat. 700 to 708.

BY EXECUTORS.

19. BY EXECUTORS.

That defendant is executor. (*h*)

Commencement as ante, 422, second form.] Saith, that the defendant, at the time of the commencement of this suit was, and from thence hitherto hath been and still is executor of the last will and testament of the said E. F. deceased, and hath administered divers goods and chattels which were of the said E. F. deceased, at the time of his death, as executor of the last will and testament of the said E. F. And this the plaintiff prays may be inquired of by the country, &c.

To *plene administravit*, that defendant had assets. (*i*)

Commencement as ante, 422, second form.] Saith, that the defendant, at the time of the commencement of this suit, had divers goods and chattels which

(*g*) An open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an "account as concerns the trade of merchandise between merchant and merchant" within the exception of the Statute of Limitations (21 J. 1, c. 16, s. 3), for the exception in the statute does not apply where an action of account cannot be maintained, *Cottam* v. *Partridge*, 4 M. & G. 271; and the Court of Exchequer has decided that the exception does not apply in any case to an action of indebitatus assumpsit, *Inglis* v. *Haigh*, 8 M. & W. 769.

(*h*) See the forms of replication, 1 Wentw. 201 ; 3 Wentw. 211 and 224 ; Rast. Ent. 322 b ; 1 Rich. C. P. 455.

(*i*) As to this replication, see Com. Dig. Pleader, 2 D. 9. See the forms, 2 Saund. 221 ; 2 Rich. C. P. 247 ; 1 Rich. C. P. 455.

were of the said E. F. deceased, at the time of his death, in the hands of the defendant as executor [*or* "administrator"] as aforesaid, to be administered, of great value, to wit, of the value of the damages sustained (*k*) by him the plaintiff by reason of the premises in the said declaration mentioned,* and wherewith the defendant, as executor [*or* "administrator"] as aforesaid, could and might and ought to have satisfied those damages. And this the plaintiff prays may be inquired of by the country, &c.

Replication and award of *venire* where only plea of *plene administravit* is pleaded.

Same as the above to the end.] And the defendant doth the like; and inasmuch as the defendants, as executors as aforesaid, do not, nor doth either of them, in or by the aforesaid plea, deny the aforesaid action of the said plaintiff, nor but that the said —— did promise in manner and form as the plaintiff hath in his said declaration alleged and above declared against the defendants as executors as aforesaid, nor but that the plaintiff ought to recover his damages occasioned by the non-performance of those promises, the plaintiff prays judgment, and his damages by him sustained on occasion of the not performing of the said promises to be adjudged to him, to be levied of the goods and chattels which were of the said —— deceased, at the time of his death. Therefore it is considered that the plaintiff do recover his damages aforesaid by him sustained by reason of the premises to be so levied, but because it is not known what damages the plaintiff hath sustained on occasion of the non-performance of the several promises aforesaid; and because it is also unknown at present whether the defendants or either of them will or will not be convicted of the premises above put in issue between the plaintiff and the defendants respectively to be tried by the country, and because until the aforesaid issues have been tried final judgment herein cannot be given, therefore let the giving of judgment herein be stayed until the issues above joined have been determined, and as well to try the said issues above joined as to inquire what damages the plaintiff hath sustained by reason of the premises aforesaid, the sheriff is commanded that he cause to come here on —— [*a general return day*], twelve &c. by whom &c. and who neither &c. to recognise &c. because as well &c. the same day is given to the parties aforesaid at the same place.

Replication to a plea of *plene administravit* by an executor of an executor, that the executor did not fully administer. (*l*)

Commencement as ante, 422, second form.] Because he saith, that the said G. H. [*the first executor*] in his lifetime did not fully administer all and singular the goods and chattels which were of the said E. F. [*the first testator*] deceased, at the time of his death, and which came to the hands of him

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It is observable that this replication does not deny the words in the plea, *ante*, 130, within brackets; the reason is, that those words are superfluous and not the material allegations to be traversed; see 2 Saund. 220, n. 3. If the defendant by his plea deny the debt, and also plead *plene administravit*, the plaintiff will, at all events, if he prove the debt, be entitled to take judgment of assets *quando acciderint*, though he should fail on the plea of *plene administravit*, *Hindsley* v. *Russell*, 12 East, 232; but the defendant will be entitled to the general costs of the cause, *Edwards* v. *Bethel*, 1 B. & Ald. 254; *Iggulden* v. *Jerson*, 2 Dowl. 277. If assets have come to the defendant's hands since the commencement of the suit, the fact should be replied specially; 6 T. R. 10; 3 Wentw. 224; see the forms, *post*, 447. The conclusion to the country is sufficient; 1 Lutw. 101.

(*k*) If in debt, say, "to wit, of the value of the debt the declaration demanded, and of the damages sustained by reason of the non-payment thereof, and wherewith the defendant as executor as aforesaid could and might and ought to have satisfied the said debt and damages &c."

(*l*) See the plea, *ante*, 131.

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the said G. H. [*the first executor*], as such executor as aforesaid, to be administered; nor hath the defendant, executor as aforesaid, since the death of the said G. H. [*the first executor*], deceased, fully administered all and singular the goods and chattels which were of the said E. F. [*the first testator*], deceased, at the time of his death, and which have come to the hands of the defendant, as executor as aforesaid, to be administered, but that the defendant, as executor as aforesaid, on the day of the commencement of this suit, had in his hands divers goods and chattels which were of the said E. F. [*the first testator*], deceased, at the time of his death to be administered, of great value, to wit, of the value of the damages sustained by the plaintiff, by reason of the premises in the said declaration mentioned, and wherewith those damages could, might and ought to have been satisfied. And this the plaintiff prays may be inquired of by the country, &c.

Replication, judgment kept on foot by fraud.

To a plea of judgment recovered against testator, replication that testator paid a sum of money in satisfaction of the judgment, and that the defendants fraudulently omitted to enter satisfaction on the roll, see form, 4 Tyr. 49; *post*, 447.

Replication to plea of outstanding judgment, that a named sum was paid in satisfaction of the judgment, but that defendants have fraudulently delayed acknowledging satisfaction of the judgment, and fraudulently permitted the same to be continued in full force. (*m*)

That G. Roberts, in his lifetime, paid to the said R. B. C., D. M., R. C. and J. L. J. a large sum, to wit, £200, in full satisfaction and discharge of the said debt by them so as aforesaid recovered against him, and of the said judgment so as aforesaid had and obtained for the same, which said sum the said R. B. C., D. M., R. C. and J. L. J. then had and received from the said G. R. in full satisfaction and discharge of the said debt by them so as aforesaid recovered, and of the said judgment so as aforesaid had and obtained for the same, but the defendant deceitfully and with the intention to defraud and deceive the plaintiff of the damages by him sustained by reason of the premises in the said declaration mentioned, have hitherto deferred and still defer procuring acknowledgment of satisfaction to be entered of the said debt by the said R. B. C., D. M., R. C. and J. L. J. so as aforesaid recovered against the said G. R., or to be released therefrom, and still permit the said judgment thereon to remain in full force and vigour to the intent aforesaid, &c.

The like to a plea of bonds or judgments outstanding.

Same as in the form ante, 445, to the asterisk, and then proceed as follows:] Over and beyond the said goods and chattels in the said plea admitted to be in the hands of the defendant to be administered, and more than sufficient to satisfy and pay the monies due and owing upon and by virtue of the said writing obligatory and judgments in the said first plea mentioned, and wherewith &c. [*Conclude as in the form ante, 445, from the asterisk.*

That defendant had assets at the time he had notice of the writ.

When the defendant pleads that he had no assets at the time of exhibiting the bill, and in point of fact he had assets at the time he had notice of the action, and before the plaintiff declared, unduly paid other debts of equal or inferior degree, without a judgment having been obtained for them (see Com. Dig. Administration, C. 2; Dyer, 32 a; 1 P. Wms. 295; 3 P. Wms. 401; 1 T. R. 690), the plaintiff may reply the issuing of the writ and the

(*m*) *Jones* v. *Roberts*, 2 Cr. & Mees. 220.

service thereof on the defendant, and that he then had assets; see the forms 3 Wentw. 214, 239; but as it appears from Dyer, 32 a; Com. Dig. Administration, C. 2, that under the general plea of plene administravit the defendant is not at liberty to give in evidence any payment after notice of the plaintiff's action, this special replication may not be necessary; *vide Hall* v. *Topper*, 3 Bar. & Adol. 655.

That after the commencement of suit, and before the plea, assets came to defendant's hands. (n)

Commencement as ante, 422, second form.] Because he saith, that he commenced this suit against the defendant as executor as aforesaid, heretofore, that is to say, on &c. and that after the commencement of this suit, and before the time of pleading the said plea of the defendant, to wit, on &c. aforesaid, and on divers other days and times between that day and the day of pleading the said plea, divers goods and chattels which were of the said E. F. at the time of his death, of great value, to wit, of the value of the said damages in the said declaration mentioned, came to and were in the hands of the defendant as executor as aforesaid to be administered, and wherewith he could and might and ought to have satisfied the damages aforesaid. And this the plaintiff is ready to verify; wherefore he prays judgment and his damages aforesaid, to be levied of the said goods and chattels which were of the said E. F. at the time of his death, which have so come to the hands of the defendant, as executor as aforesaid, to be administered, since the commencement of this suit &c.

To plea of judgments recovered against executor, that they were obtained by fraud. (o)

Commencement as ante, 422, second form.] Saith, that the said judgment in the said first plea mentioned to have been recovered against the defendant by the said E. F. was had and obtained by the fraud and covin of the defendant, and with the intent to defraud the plaintiff of his debt. And the plaintiff further saith, that the said judgment in the said first plea mentioned to have been recovered against the defendant by the said G. H. was had and obtained by the fraud and covin of the defendant, and with the intent to defraud the plaintiff of his said debt. And this the plaintiff is ready to verify, &c.

To a plea of judgment recovered against executor, that he fraudulently suffered the judgment to be obtained against him for more than was due. (p)

Commencement as ante, 422, second form.] Saith, that the said E. F. in his lifetime, and at the time of his death, was indebted to the said G. H. in a much less sum of money than the said sum of £——, to wit, in the sum of £—— only, and no more, and that the defendant permitted and suffered the said judgment in the said plea mentioned to pass against him the defendant for much more, to wit, for the sum of £—— more than was due and

(n) This should be replied; 6 T. R. 10. See another form, 3 Wentw. 224, 245, and the opinion therein given, and the observations of Ashurst, J. 6 T. R. 10, 11; 1 Saund. 336 a; 2 Saund. 216, n. 1; 216, n. 2; and see the form of the judgment, 1 Saund. 336 a.

(o) See the forms, 1 Lutw. 660; 2 Saund. 49; Plead. Assist. 373; 1 Lil. Ent. 159; *Jones* v. *Robarts*, 2 Cr. & M. 219. As to this replication in general, see Com. Dig. Pleader, 2 D. 9; 5 T. R. 80. It is sufficient to allege generally, that the judgment was obtained or continued by covin, without showing the special matter, and that it was by the covin of the executor or administrator only; 9 Rep. 110. If several judgments be pleaded, the plaintiff may, in his replication, answer one only, or every judgment separately; 2 Saund. 48, 49; 1 Saund. 334, 335, 337 b, n. 2.

(p) See the note to the above form, and Lil. Ent. 159. When any thing was due at the time the judgment was obtained, but it was confessed fraudulently for too large a sum, this replication is proper; 5 T. R. 82.

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owing from the said E. F. in his lifetime, and at the time of his death, to the said G. H. by the fraud and covin of the defendant, and the said G. H., in order to cover and protect the goods and chattels which were of the said E. F. at the time of his death, which had or might come to the hands of the defendant to be administered, from the payment and discharge of the damages sustained by the plaintiff by reason of the non-performance of the said several promises in the said declaration mentioned, and to prevent the plaintiff from recovering his damages aforesaid. And the plaintiff further saith, that the defendant now hath, and at the time of the commencement of this suit had, divers goods and chattels which were of the said E. F. deceased, at the time of his death, in his hands to be administered, sufficient to satisfy all the money really due and owing from the said E. F. at the time of his death to the said G. H. and the damages aforesaid, by the judgment aforesaid, in form aforesaid recovered, and also the damages sustained by the plaintiff by reason of the non-performance of the said several promises in the said declaration mentioned. And this the plaintiff is ready to verify, &c. (q)

To plea of bond outstanding, that it has been paid, and is fraudulently kept on foot. (r)

Commencement as ante, 422, second form.] Saith, that after the making of the said writing obligatory in the said plea mentioned, and before the pleading of the said plea, to wit, on &c. the said writing obligatory to the said G. H. and all money thereon due and payable was fully paid off, discharged and satisfied to him the said G. H. And the plaintiff in fact further saith, that notwithstanding such payment and discharge of the said writing obligatory to the said G. H. as aforesaid, the said writing obligatory is still kept on foot uncancelled, by the fraud and covin of the defendant, with intent to defraud the plaintiff of the damages by him sustained on occasion of the premises in the said declaration mentioned. And this the plaintiff is ready to verify, &c.

Replication to plea of retainer on an indenture, that the same was void for fraud.

Commencement as ante, 422, second form.] Saith, that the said alleged indenture was made and entered into and executed by the said E. F. deceased, for the purpose and with the intent of the said E. F., and others in collusion with him, to defraud the plaintiff and others, the creditors of the said E. F., of their just and lawful debts and claims against the said E. F., and therefore the same was and is void in law. And this the plaintiff is ready to verify, &c.

Replication to plea of retainer by executor for a debt due to himself, that testator was not indebted to the defendant as in the plea alleged.

And the plaintiff, as to the plea of the defendant by him [secondly] above pleaded, says, that the said —— was not indebted to the defendant in manner and form as in the said [second] plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication to a plea of *retainer* by a defendant sued as

And the plaintiff, as to the said —— plea, saith, that the defendant never was executor of the last will and testament of the said Y. Z., except of his the defendant's own wrong, and by his wrongfully intermeddling with the

(q) *Quære*, as to this conclusion; see 1 Saund. 103, n. 3.

(r) See the form 3 Wentw. 243, 244, and other more special forms, Lil. Ent. 58; Bro. Red. 56; 1 Saund. 333 to 336, and the law and forms referred to, 1 Saund. 334, note 9; and see form, *ante*, 446, and 4 Tyr. 449.

goods and chattels which were of the said Y. Z. deceased, at the time of his death, after his death, and without the said E. F. having made his last will or testament in writing, and thereby constituted or appointed the defendant executor thereof, and without the defendant having been in any manner authorised to act as executor of the last will or testament of the said Y. Z. or to administer the goods, chattels, rights, credits, estate or effects of the said Y. Z. as alleged in the said plea. And this the defendant prays may be inquired of by the country.

executor, that defendant was executor *de son tort*, and therefore not entitled to detain. (*s*)

If the defendant have pleaded the general issue, as well as plene administravit, and the plaintiff is not certain of being able to prove that the defendant has received assets, he should not take issue on the latter plea, but should reply as follows, upon which the defendant usually withdraws the general issue, or will have to pay the costs of the trial, in case the plaintiff obtains the verdict.] And the plaintiff, as to the said plea of the defendant by him first above pleaded, and whereof he hath put himself upon the country, doth the like. And as to the plea of the defendant by him lastly above pleaded, the plaintiff, inasmuch as he cannot deny the said several allegations of the defendant in his said last plea, prays judgment, and his damages by him sustained on occasion of the not performing of the said several promises in the said declaration mentioned to be adjudged to him, to be levied of the goods and chattels which were of the said G. H. at the time of his death, and which, since the pleading of the said second plea of the defendant, have come, (*u*) or which shall hereafter come, to the hands of the defendant, as executor [*or* "administrator"] as aforesaid, to be administered, [*or if the plea were of bonds, &c. outstanding, and plene administravit præter, here add the following words,* " after satisfying the monies due and owing on the said several judgments and writings obligatory in the said last plea mentioned."] But because it is uncertain whether the defendant will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue, and in order to try the said issue let a jury come, &c. [*Award of venire as usual.*

Similiter to general issue, and to plea of *plene administravit*, prayer of judgment of assets *quando acciderint*. (*t*)

And hereupon the plaintiff, inasmuch as the defendant hath not denied the said action of the plaintiff, nor but that the said E. F. in his lifetime did promise in manner and form as the plaintiff hath above in that behalf alleged, and inasmuch as he the plaintiff cannot deny but that the defendant had not any goods or chattels which were of the said E. F. at the time of his death in his hands to be administered, in manner and form as the defendant hath above in his said plea in that behalf alleged, prays judgment, and his damages by him sustained on occasion of the not performing of the said several promises in the said declaration mentioned to be adjudged to him, to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which, since the pleading of the said second plea of the

The like with award of inquiry, where the general issue was not pleaded.

(*s*) See *Oxenham* v. *Clapp*, 2 Bar. & Adol. 309; and see a different form in Chitty, jun. Prec. 302.

(*t*) As to this replication, see Com. Dig. Pleader, 2 D. 9.

(*u*) See 6 T. R. 10; 1 Saund. 336 a.

By Executors. defendant, have come, or which shall hereafter come, to the hands of the defendant to be administered, [*or if the plea were of bonds, &c. outstanding, and plene administravit præter, here add the following words,* " after satisfying the monies due and owing on the said several judgments and writings obligatory in the said last plea mentioned."] Therefore it is considered that the plaintiff ought to recover against the defendant his damages by him sustained on occasion of the premises, to be levied in form aforesaid, but because it is unknown to the Court of our said lady the queen now here what damages the plaintiff hath sustained by means of the premises, the sheriff is commanded, that, by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the plaintiff hath sustained by means of the premises, and that he send the inquisition which he shall thereupon take to our said lady the queen at Westminster, on —— next after ——, under his seal and the seals of those by whose oath he shall take that inquisition, together with the writ of our lady the queen to him thereupon directed, the same day is given to the plaintiff and to the defendant at the same place.

The judgment.

Replication to a plea of *plene administravit præter* praying judgment as to the £10, and averring assets extra sufficient to pay the debt.

See a form 3 Wils. 52.

XVIII. REPLICATIONS TO PLEAS IN DEBT.

1. In General.

In General.

B. agt. D. } And the plaintiff, as to the plea of the defendant, whereof he hath put himself upon the country, doth the like.

Similiter to plea concluding to the country.

And the plaintiff, as to the plea of the defendant by him [secondly] above pleaded, says, that [*here state the subject-matter of the replication; and when the replication concludes with a verification otherwise than of matter of record, the form is as follows:*] And this the plaintiff is ready to verify, &c.

Common conclusion with a verification.

See form of replication *de injuriâ* in assumpsit, *ante*, 422, which may be readily adapted to *debt*.

Replication in debt *de injuriâ*.

See *Thorn* v. *Jenkins*, 1 D. & L. 604.

To plea of no demand, in debt on bond conditioned for payment of money on demand, replication that there was a demand.

2. Fraud.

Fraud.

Commencement as above, second form.] Saith, that the said writing obligatory in the said declaration mentioned was obtained fairly and honestly by the plaintiff, (*b*) and not by the plaintiff and others in collusion with him, by fraud, covin or misrepresentation, in manner and form as the defendant hath in his said plea by him [lastly] above pleaded alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea that deed was obtained by fraud, that it was duly obtained. (*a*)

3. Duress.

Duress.

Commencement as above, second form.] Saith, that the defendant of his own free will made and sealed, and as his act and deed delivered to the plaintiff, the said writing obligatory in the said declaration mentioned, (*d*)

To plea that deed was obtained by menaces, that defendant freely executed it. (*c*)

(*a*) See the plea, *ante*, 176; see a rejoinder that a deed was duly obtained, 2 Rich. C. P. 73; and replications to that effect, Morg. 536, 537.

(*b*) It would suffice merely to deny the words of the plea.

(*c*) See pleas of menace, &c. *ante*, 176. The replications to the other pleas, *ante*, 176, will nearly resemble the above form; see the forms in 7 Wentw. 397, 590 to 596, and Com. Dig. Pleader, 2 W. 19, 20. See replication to plea of duress of imprisonment, 2 Rich. C. P. 73; Morg. 535, 537.

(*d*) It would seem sufficient merely to deny the words in the plea.

DURESS.

and not by reason or in consequence of the said alleged menaces or threats in the said [second] plea mentioned, or in fear or apprehension thereof, in manner and form as the defendant hath in his said [second] plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

INFANCY.

4. INFANCY.

To plea of infancy, that defendant was of age. (*e*)

Commencement as ante, 451, *second form.*] Saith, that the defendant at the time of the making of the said writing obligatory in the said declaration mentioned, was of the full age of twenty-one years, and not within age, in manner and form as the defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

ILLEGALITY.

5. ILLEGALITY.

To plea of usury or other illegality, that the bond was given upon a legal contract. (*f*)

Commencement as ante, 451, *second form.*] Saith, that the said writing obligatory in the said declaration mentioned was made by the defendant for a good and legal consideration, and not in pursuance of or upon the said corrupt and unlawful agreement, or for the purpose in the said plea of the defendant mentioned, in manner and form as the defendant hath above in his said [second] plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication that bond was given for a lawful consideration. (*g*)

And as to the plea of the defendant by him [secondly] above pleaded, the plaintiff saith, that the said writing obligatory was not made or executed or delivered by the defendant upon or for the alleged unlawful consideration in the said plea mentioned as therein alleged. And this the plaintiff prays may be inquired of by the country, &c.

TENDER.

6. TENDER.

To a plea of tender. (*h*)

Similiter to general issue as ante, 451; *replication to plea of tender as follows*:] And the plaintiff, as to the plea of the defendant by him above pleaded as to the said sum of £——, residue of the said sum of £—— above demanded, saith, that the plaintiff ought not to be barred from maintaining his aforesaid action against the defendant to recover damages by reason of the non-payment of the said sum of £——, because he saith, that &c. [*Here state the subject-matter of the replication as in the form in assumpsit, ante, using the words,* " after the said several causes of action in the said

(*e*) See the plea, *ante*, 177, and the forms, Rast. Ent. 163 a; 7 Wentw. 577, 578; Com. Dig. Pleader, 2 W. 22, and the replications in assumpsit, *ante*.

(*f*) See the plea, *ante*, 178, and the form, 2 Rich. C. P. 37; Morg. Prec. 229, 230; 1 Bro. Ent. 188; 2 T. R. 439; 3 T. R. 426; 7 Wentw. Index, 628, 629, 630; Com. Dig. Pleader, 2 W. 23. Some of the forms conclude with a formal traverse and verification, Lil. Ent. 184; Morg. 231; but see 2 T. R. 439; and 1 Saund. 103 b, note 3.

(*g*) See form of replication in *Symmons* v. *Knox*, 3 Term Rep. 65.

(*h*) See the forms, 7 Wentw. 577, 580, 584, 589.

declaration mentioned, and each and every of them, accrued to the plaintiff as to the said sum of £——" *instead of the words* "after the making of the said promises in the said declaration mentioned," *and then conclude as follows:*] And this he the plaintiff is ready to verify; wherefore he prays judgment and his damages, by reason of the non-payment of the said sum of £——, to be adjudged to him, &c. [*but if the replication merely deny the tender, then conclude to the country.*

7. SET-OFF.

Commencement as ante, 451, *second form.*] Says, that he the plaintiff was not nor is indebted to the defendant in manner and form as the defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication to a plea of set-off to debt on bond, denying the set-off. (*i*)

Commencement as ante, 451, *second form.*] Protesting that at the time of the commencement of this suit there was and still is a much larger sum of money than the said sum of £—— due and owing for principal money and interest upon and by virtue of the said writing obligatory and the said condition thereof, to wit, the sum of £——, nevertheless, for replication in this behalf, the plaintiff saith, that the plaintiff was not nor is indebted to the defendant in manner and form as the defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication to plea of set-off to debt on bond, (protesting that more is due to plaintiff on the bond than the sum admitted in defendant's plea,) states that plaintiff is not indebted to defendant. (*k*)

That before and at the time of the commencement of this suit there was and still is due and owing from the defendant to the plaintiff, for and on the account of the said sum of £—— and interest in the said condition mentioned, a much larger sum of money than the said sum of £—— in the said plea mentioned, to wit, the sum of £——. And this the plaintiff prays may be inquired of by the country, &c.

Replication to plea of set-off, that defendant owed more on the bond than the sum admitted in plea. (*l*)

8. BY AND AGAINST HEIRS, &c.

Commencement as ante, 451, *second form.*] Saith, that the defendant hath, and at the time of the commencement of this suit had, sufficient lands, tene-

To plea of *rien per descent*, that defendant had assets at the time of commencement of the suit. (*m*)

(*i*) See form, 2 Rich. C. P. 31. The replication to a plea of set-off to debt on simple contract, when it concludes to the country, is precisely similar to that in assumpsit, *ante*, 438. Where the set-off is to debt on bond, the replication may either deny the subject-matter of the defendant's set-off, or allege that more was due on the defendant's bond than the sum mentioned in the plea; see 3 T. R. 65; 6 T. R. 460. As to the replication to a plea of set-off in general, see *ante*, vol. i. Index, "*Set-off.*"

(*k*) See 2 Rich. C. P. 31. When it was apprehended that the plaintiff was not indebted to defendant in a sum equal to that admitted in the plea to be due on the bond, the above replication was considered preferable, but protestations are now abolished.

(*l*) That this may be replied, see *Symmons* v. *Knox*, 3 T. R. 65; *Grimwood* v. *Barrett*, 6 T. R. 460.

(*m*) See the plea, *ante*, 185, and forms of replication, 1 Rich. C. P. 451; 2 Rich. C. P. 38; Morg. 665; 2 Mod. 227, 228; 7 Wentw. 603, 604, 605. And see several forms of replications and rejoinders, Morg. 654 to 660. If the defendant had not assets at the time of exhibiting the bill, but had them at the time the writ issued, the issuing of the writ was replied specially; and under the 3d & 4th W. & M. c. 14, if the heir plead *rien per descent*, the plaintiff may reply that he had

By and against Heirs, &c.

ments and hereditaments by descent from his said father [*or* "brother" *&c. according to the fact*] in fee simple, wherewith the defendant could and might and ought to have satisfied the said debt of the plaintiff above demanded. And this the plaintiff prays may be inquired of by the country, &c.

To plea of *rien per descent*, that defendant had assets before the commencement of the suit. (*n*)

Commencement as ante, 451, *second form.*] Because, according to the form of the statute in such case made and provided, he saith, that the defendant, after the death of the said E. F. his father, and before the commencement of this suit, to wit, on &c., had divers lands and tenements by hereditary descent as heir to the said E. F. in fee simple, whereby he might have satisfied the plaintiff the debt and damages aforesaid. And this the plaintiff is ready to verify, &c. (*o*)

Payment.

9. Payment.

To plea of *solvit ad diem*, or *post diem*, denying the payments. (*p*)

Commencement as ante, 451, *second form.*] Saith, that the defendant did not pay to the plaintiff the said sum of £—— in the said condition mentioned, with lawful interest for the same, as in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea of payment into Court, replication that the defendant is indebted to a greater amount. (*q*)

And the plaintiff, as to the plea of the defendant by him above pleaded, says, that he the plaintiff ought not to be barred from further maintaining his aforesaid action against the defendant, because he says that the defendant was and still is indebted to him to a greater amount than the said sum of £—— in respect of the debts and causes of action in the declaration mentioned. And this the plaintiff prays may be inquired of by the country, &c.

On Annuity Deeds.

10. On Annuity Deeds.

To plea, that no memorial con-

Commencement as ante, 451, *second form.*] The plaintiff saith, that a memorial of the said writing obligatory [*or* "indenture"] in the said declaration

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assets between the death of his ancestor and before the commencement of the suit, as in the next form; see Bac. Ab. Heir and Ancestor, F.

(*n*) See forms, 5 Wentw. 373; 1 Rich. C. P. 451; 2 Rich. C. P. 296, and the note to the preceding form, 5 Mod. 122, 123.

(*o*) This seems necessary; see 2 Saund. 8 a; Carth. 353, 354.

(*p*) See the pleas, *ante*, 186. See form of replication, Plead. Assist. 360. To annuity bond, see form, 2 New Rep. 362. To bond for payment of mortgage, 5 Moore, 198. In the latter case, to debt on bond the defendant craved oyer, and after reciting a mortgage deed, which showed the condition to be for payment of a sum of money on a day specified, according to the tenor of a proviso contained in the indenture, and for the performance of the covenants therein, pleaded that there were no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, and performed all the covenants and provisoes in the indenture on his part to be performed. The plaintiff in his replication took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for causes that it should have concluded with a verification, and that no breach of the condition was assigned according to the stat. 8 & 9 W. 3, c. 11, s. 8, it was held that such replication was good, as the only point in issue was the payment of the money, and as the plaintiff had therein denied the whole substance of the defendant's plea.

(*q*) See Reg. Gen. T. T. 1 Vict. The omission of the words "and still is" is bad on special demurrer; *Faithful* v. *Ashley*, 12 A. & E. 183; 4 P. & D. 524, S. C.

mentioned was within thirty days after the execution thereof, to wit, on &c. [*day of inrolment*] duly inrolled in the High Court of Chancery at Westminster, in the county of Middlesex, according to the directions and in pursuance of the said statute in that case made and provided, and which said memorial was and is as follows, to wit, [*here copy the memorial verbatim*] as by the said memorial now remaining duly inrolled in the said High Court of Chancery at Westminster aforesaid more fully appears. And the plaintiff further saith, that the said memorial did duly contain and set forth the day of the month and the year when the said writing obligatory in the said declaration mentioned bore date, and the names of all the parties and of all the witnesses thereto, and of the person and persons for whose life or lives the said annuity was granted, and of the person and persons by whom the same was to be beneficially received, and the pecuniary consideration for granting the same, and how such consideration was paid, and the annual sum and sums to be paid, in the form and to the effect as in and by the said statute in that case made and provided is required, as by the said inrolment of the said memorial remaining of record (*s*) in the said Court of Chancery at Westminster aforesaid more fully appears. And this the plaintiff is ready to verify by the said record (*s*) when, where and in such manner as the Court here shall order and direct.

taining the names of the witnesses was inrolled, setting out the memorial, &c. (*r*)

And the plaintiff, as to the said —— plea, saith, that the said writing obligatory [*or* "indenture"] was not made or entered into by the defendant, nor was the said annuity raised upon or for pecuniary considerations, in manner and form as the defendant hath in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication that the annuity was not for a pecuniary consideration.

And as to the plea of the defendant by him [firstly] above pleaded, the plaintiff says, that after the making of the said bond, and before any part of the arrears of the annuity in the declaration mentioned accrued, and before the petition of the said J. S. in the said plea mentioned, to wit, on the —— day of ——, A. D. ——, by a certain indenture bearing date, to wit, the day and year last aforesaid, [which *&c. proferi*] reciting a certain indenture of the —— day of ——, A. D. ——, between the defendant of the first part, the said J. S. of the second part, and one W. D. of the third part, and also reciting the said bond in the declaration mentioned, the said J. S. conveyed the said annuity, yearly rent-charge or annual sum of £—— by the said bond and last-mentioned indenture respectively granted and also secured, and the said bond and indenture, to R. J. and G. W. on certain trusts in the

To plea of intestate's discharge under a former insolvent act, to declaration by administrator on bond conditioned for payment of arrears of annuity, replication that before arrears and before insolvency the intestate assigned the annuity and bond to certain persons in trust. (*t*)

(*r*) See the plea, *ante*, 187, and the replication in 4 T. R. 585; 2 H. Bla. 281; 3 Bing. 218; *Hicks* v. *Cracknell*, 3 M. & W. 73; and see 1 New Rep. 218, 219; 1 Chit. Col. Stat. 24. Where the declaration stated the annuity deed to have been made between the defendant of the one part, and the plaintiff of the other part, and to a plea denying the inrolment, the replication set forth a memorial properly inrolled, but stating the parties to the deed to be the defendant and his wife A. K. of the one part, and the plaintiff of the other part, it was held on special demurrer that the memorial was sufficient, and the replication good; *Papineau* v. *King*, 10 M. & W. 216. When a nominal consideration of 10*s.* is expressed in an annuity deed to have been paid to a surety, it need not be stated in the memorial under 53 Geo. 3, c. 141, s. 2; *Few* v. *Backhouse*, 8 A. & E. 789; 1 P. & D. 34, S. C.

(*s*) It has been usual to conclude this plea with a verification by the record, but it would seem sufficient to conclude with a verification and prayer of judgment generally. See *Richardson* v. *Tomkies*, 9 Bing. 51.

(*t*) See *Sims* v. *Thomas*, 12 A. & E. 536; 4 P. & D. 239, S. C.

On Annuity Deeds.

said indenture now brought into Court here mentioned and declared, as by the said indenture, reference being thereunto had, will more fully and at large appear. By virtue of which said indenture the said R. J. and G. W. then became and were possessed of and entitled to the said annuity or yearly rent-charge of £——, and the said J. S. wholly ceased to have and never afterwards had any beneficial or equitable estate, title or interest whatever of or in or to the same or any part thereof; and of which said indenture the defendant afterwards and before the said J. S. petitioned for his discharge, to wit, on the —— day of ——, A. D. ——, had notice. And so the plaintiff says, that the said cause of action in the said declaration mentioned did not at any time become vested in the said R. C. [*the assignee*] in manner and form as in the said [first] plea is alleged. And this the plaintiff is ready to verify, &c.

To plea of the plaintiff's bankruptcy in action on bond, replication that the plaintiff had assigned the bond as a security to certain persons to whom he was indebted in a greater amount than the bond, and that the action was brought for their benefit.(u)

And the plaintiff, as to the plea of the defendant by him [firstly] above pleaded, says, that before the plaintiff became bankrupt, and before the issuing of the fiat as in the said plea mentioned, to wit, on the —— day of ——, A. D. ——, by a certain indenture bearing date, to wit, the day and year last aforesaid, then made between the plaintiff of the one part, and J. G. and M. E. of the other part [*profert*] reciting &c., the plaintiff assigned to the said J. G. and M. E. the said bond, with all principal and interest due or to be due thereon, and all the benefit and advantage thereof to be made or obtained by means thereof, or by any process or execution thereupon sued out or executed, and all right, title &c. of the plaintiff to the said bond and monies, and all powers and remedies for recovering the same to their own use and benefit, subject nevertheless to the proviso, that if the plaintiff should pay to the said J. G. and M. E. the said sum of [£1000] with interest on a day therein named, the indenture should be void. And the plaintiff further says, that he the said plaintiff by the said indenture appointed the said J. G. and M. E. his lawful attornies irrevocably in his name, but for their own sole use and benefit, to sue for and recover from the defendant the said sum of [£500] and interest when the same became due on the said bond &c., as by the said indenture of assignment, reference being thereto had, will more fully appear, whereof the defendant, before the plaintiff became bankrupt and before the issuing of the fiat, had notice. And the plaintiff further says, that he the plaintiff at the time of making the said indenture was justly indebted to the said J. G. and M. E. as therein alleged, and that he did not pay them the said sum of [£1000] on the day named in the said indenture, nor at any other time before or since, and that there was and still is due to them on account of the said sum of [£1000] a large sum, to wit, [£800], which greatly exceeds the amount due upon and by virtue of the bond mentioned in the declaration, and that the action was commenced and is prosecuted in the name of the plaintiff for the sole use and benefit and at the instance of the said J. G. and M. E., and for the purpose of enabling them to recover the money due on the said bond in part satisfaction of the debt so due from the plaintiff, according to the form and effect of the said indenture of assignment, and not for the use or benefit of

(u) See *Dangerfield* v. *Thomas*, 9 A. & E. 292; 1 P. & D. 289, S. C.

the plaintiff or his said assignees or creditors under the fiat. And this the plaintiff is ready to verify, &c.

11. On Awards.

To plea that no award was made, stating the award and breaches. (x)

Commencement as ante, 451, *second form.*] Saith, that the said E. F. and G. H., the said arbitrators in the said condition of the said writing obligatory mentioned, after the making of the said writing obligatory, and within the time limited and appointed by the said condition for the making of their award of and concerning the premises, that is to say, on &c. having taken upon themselves the burthen of the said arbitrament, did in due manner make their award in writing under their hands of and concerning the premises in the said condition mentioned, and thereby referred to them by the plaintiff and the defendant, ready to be delivered to the said parties in difference, or such of them as should require the same, by which said award they the said E. F. and G. H., the arbitrators aforesaid, did then award and order &c. [*here set forth the whole award verbatim in the past tense.*] (y) Of which said award the defendant afterwards, to wit, on the said &c. had notice. Nevertheless the plaintiff in fact saith, that the defendant did not &c. [*here state the defendant's breach of the award, according to the facts of the particular case, and which may be as in the declaration, ante*, vol. ii. *and if there have been several breaches of the award, state the second or other breach as follows:*] And for assigning a further breach of the said award, according to the form of the statute in that case made and provided, (z) the plaintiff in fact further saith, that &c. [*here state the other breach, and conclude as follows:*] And this the plaintiff is ready to verify; wherefore he prays judgment and his debt aforesaid, together with his damages by reason of the detention thereof to be adjudged to him, &c.

Breaches of the award.

12. On Bail Bonds.

To plea of ease and favour to debt on bail-bond, that bond was duly executed. (a)

Commencement as ante, 451, *second form.*] Saith, that the defendant, as bail or surety for the said E. F., whilst the said writ in the said declaration

(x) See the plea, *ante*, 189, and the forms of replication of an award and breach, 1 Saund. 165, 166; 2 Saund. 184, 185: 2 Wils. 267; 2 Rich. C. P. 44; Morg. Prec. 527; 7 Wentw. 527 to 530; and of an umpirage, 1 Saund. 63.

(y) The *whole* award must be stated; 11 East, 188; 1 Salk. 72, 73; 2 Saund. 62 b, n. 5.

(z) A breach must be stated, though the defendant pleaded no award, and could not traverse the breach, this is an anomalous case; 1 Saund. 103, n. 1; 317, n. 4; 1 Marsh. 95; 6 Taunt. 45, 47; 5 Taunt. 386; see form, 2 Rich. C. P. 46; Morg. 528. The breach may frequently be assigned in the terms of the award; 1 Price, 109; but see 6 Taunt. 45, 47.

(a) See the plea, *ante*, 193, and the replication and note, 5 Wentw. 468; and see the forms, 1 Saund. 159, 18; 7 Wentw. 613, 614; Com. Dig. Pleader, 2 W. 25. The ease and favour is in general the most material to traverse; 1 Saund. 163, n. 2. Most of the forms conclude with a formal traverse and verification, but this seems unnecessary; see 5 Wentw. 482, 483, 468; 1 Saund. 103, a, b.

If the defendant, in an action by the assignee of the bond, denies the issuing of the process, the plaintiff should reply it was issued as stated in the declaration, and aver the existence of the writ by the record; see Tidd, 9th ed. 743. In such case, if the action be at the suit of the sheriff, the writ should be set out fully, and plaintiff should also aver its existence &c. by the record.

On Bail Bonds.

mentioned was in full force, and on the day of the date of the said writing obligatory, to wit, on &c. sealed and as his act and deed delivered the said writing obligatory in the said declaration mentioned, and in manner and form as the plaintiff hath in his said declaration alleged, and not after the time for executing the said [writ] in the said declaration mentioned had elapsed, in manner and form as the defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

To a plea of *comperuit ad diem*, denying the record of appearance. (*c*)

Commencement as ante, 451, *second form.*] Saith, that there is no record of the said appearance of the said E. F. before our lady the queen [*or in C. P.* "before her majesty's justices"] at Westminster, on ——, in the said condition of the said writing obligatory mentioned, remaining in the said Court of our said lady the queen, before the queen herself, [*or in C. P.* "before her said majesty's justices,"] at Westminster, in manner and form as the defendant hath above in his said —— plea alleged. And this the plaintiff is ready to verify, &c. [*conclude as in form, ante*, 435, *from the asterisk.*]

On Indemnity Bonds.

13. On Indemnity Bonds.

To plea of *non damnificatus*, to debt on bond to indemnify plaintiff against a surety bond, stating how plaintiff was damnified. (*d*)

Commencement as ante, 451, *second form.*] Saith, that the defendant did not nor would well and truly pay or cause to be paid unto the said E. F., his executors, administrators or assigns the said sum of £—— and the interest thereof on the days and times and in the manner limited and appointed in and by the said condition of the said writing obligatory so made and executed to the said E. F. as aforesaid, and according to the true intent and meaning thereof, but wholly neglected and refused so to do; whereupon and whereby the plaintiff afterwards, to wit, on &c. was called upon and forced and obliged to pay and did then pay to the said E. F. the said sum of £—— and the interest thereof, together with the costs of a certain action before then brought by the said E. F. against him the plaintiff for the recovery thereof, amounting in the whole to a large sum of money, to wit, the sum of £——, and thereby he the plaintiff was and is damnified to the amount thereof, by reason and means of the said in part recited obligation and the condition thereof. And this the plaintiff is ready to verify, &c.

On Bonds for Performance of Covenants.

14. On Bonds for the Performance of Covenants.

To plea of performance, to debt on bond conditioned for E. F.'s duly

Commencement as ante, 451, *second form.*] Saith, that the said E. F. remained and continued in the service and employ of the plaintiff as such clerk, as in the said condition of the said writing obligatory mentioned, for a long time, to wit, from the day and year aforesaid until and upon the —— day

(*c*) See a form, Lil. Ent. 498.

(*d*) See the plea, *ante*, 195; and the forms, 1 Saund. 115; 7 Wentw. 616 to 621; and on a sheriff's bond, 1 East, 385. The above was the replication in *Holmes* v. *Rhodes*, 1 B. & P. 631; and was specially demurred to, because it did not state in what Court the plaintiff was sued, and what sums he was obliged to pay for interest and costs distinctly, but the plaintiff had judgment on a defect in the plea. As to this objection, see 1 Saund. 117, n. 5; 1 Lev. 195; 2 Wils. 11, 12; and next note.

of ——, A. D. ——; (*f*) and that during the said time that the said E. F. so remained and continued in the said service and employment of the plaintiff as such clerk as aforesaid, to wit, on &c. and on divers other days and times between that day and the said —— day of ——, A. D. ——, the said E. F., as such clerk as aforesaid, had and received, for and on the account of the plaintiff, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £——, (*g*) yet the said G. H., although often requested so to do, hath not yet accounted for or paid the same or any part thereof to the plaintiff, but hath therein wholly failed and made default; and the said sum of money so had and received by the said E. F. as aforesaid is still wholly unpaid and unsatisfied to the plaintiff, contrary to the form and effect of the said condition of the said writing obligatory. And this the plaintiff is ready to verify, &c.

accounting as a clerk, that E. F. received monies which he has not accounted for. (*e*)

Same as in the above form to the end of the verification, and then state the second breach as follows:] And for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in that case made and provided, (*i*) the plaintiff saith that after the making of the said writing obligatory, and whilst the said E. F. remained and continued in the said service and employ of the plaintiff as such clerk as aforesaid, to wit, on &c. [*state the breach according to the fact, and conclude with a verification, as in the preceding form.*

The like stating several breaches. (*h*)

N. B. The cases in 5 *Taunt.* 386; 1 *Marsh.* 95; *and* D'Aranda *v.* Houston, 6 *Car. & P.* 516, *establish the necessity for* assigning *breaches in replications before* trial *of any issue in fact, or of* suggesting *breaches and assessing damages before final judgment. See post "Suggestions."*

Necessity for *replying* or *suggesting* breaches before trial or final judgment.

15. On Charter Parties.

On Charter-Parties.

And the plaintiff, as to the said plea of the defendants by them [secondly] above pleaded in bar, says, that the defendants within the space of sixty-five

Replication to a plea to action on charter-party, that defendant did not offer a cargo.

(*e*) The averments in pleas of this nature must depend on the nature of the indemnity bond; see the pleas of performances, *ante*, 195 to 199, and the forms of replications and the law, 8 T. R. 459, 460; 1 B. & P. 640, 641; 2 New Rep. 176, 177; 3 East 485; 6 East, 507; 1 Saund. 101; 2 Saund. 410; 3 Wils. 385; 7 Wentw. 537, 605, 616; 1 Marsh. 95; 5 Taunt. 386; 6 Taunt. 47; 2 Chit. Rep. 697; 5 Moore, 198; 13 East, 1. The case in 1 Price, 109, seems overruled by that in 1 Marsh. 441; 6 Taunt. 45; *ante*, vol. i. Index, "*Indemnity.*" Special statements of breaches, 1 Saund. 55, 56, 316. On sheriff's bond, Cowp. 575; 1 East. 385. When liability ceases, 2 Taunt. 175; 4 Taunt. 593, 673. The replication must not merely deny the general performance as stated in the plea, but must *assign*, and not *suggest*, a breach or breaches; 1 Marsh. 95; 5 Taunt. 386; Willes, 12; Cowp. 575; 2 Saund. 187 b, 5th edit.; see the note *ante*, vol. i. 383. Where breach is to be assigned in replication, *D'Aranda* v. *Houston*, 6 C. & P. 511. A replication traversing matter of excuse properly concludes to the country, without assigning a breach; *Webb* v. *James*, 8 M. & W. 645. See form of plea of performance by an auctioneer to debt on bond that he accounted for sale, and *replication denying the same*, *Rex* v. *Sedgwick*, 2 Crom. M. & Ros. 603.

(*f*) Unless it appear from the condition of the bond that E. F. has already accepted the office, an acceptance thereof should be stated.

(*g*) A receipt of money must be shown; 6 Taunt. 47; 1 Marsh. 441, overruling 1 Price, 109.

(*h*) This replication is given by the statute 8 & 9 Will. 3, c. 11, s. 8; see 1 Saund. 58, n. 1; 2 Saund. 187 a, n. 2; *ante*, vol. i. 383; 13 East, 1; see form, Morg. 595.

(*i*) See 13 East, 3.

On Charter-parties.

running days, and ten days after the expiration of the said sixty-five running days from the arrival of the said ship at the port of S. did not offer and tender to the plaintiff goods and merchandizes to load on board the said ship on her homeward voyage from the said port of S. for her return to the port of London, and to despatch the said ship with the same from the said port of S. for her return to the port of London, in manner and form as the defendant hath above in his said [second] plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication that the ship sailed before the expiration of the time.

And the plaintiff, as to the said plea of the defendants by them [lastly] above pleaded, says, that the plaintiff did not within the space of sixty-five running days, and ten days after the expiration of the said sixty-five running days from the arrival of the said ship at the port of S. with the said ship, quit the said port of S. in the manner and form as the defendant hath above in his [last] plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

On Leases.

16. On Leases.

Denial of the eviction. (*k*)

Commencement as ante, 451, *second form.*] Saith, that the plaintiff did not, before the said rent became due, eject, expel, put out or amove the defendant from the possession of the said demised premises, or any part thereof, in manner and form as the defendant hath above in his said plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea by lessee, that plaintiff accepted an assignee as tenant, traverse of the acceptance. (*l*)

Commencement as ante, 451, *second form.*] Saith, that he the plaintiff did not accept or receive of and from the said G. H. the said rent in the said plea mentioned, or any part thereof, or accept the said G. H. as his tenant of the said demised premises with the appurtenances, in manner and form as the defendant hath in his said plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea that the house and premises were uninhabitable through the plaintiff's neglect, replication denying such neglect and averring that the premises became in that state through default of the defendant.

See *Arden* v. *Pullen*, 10 M. & W. 322.

(*k*) See the plea, *ante*, 202; 2 Saund. 176, 177. Where to an action of covenant for rent due for turnpike tolls, the defendant pleaded that before it became due the trustees entered into and upon a certain part of the tolls, and then ejected, expelled, put out and removed the defendant from the possession thereof, and kept and continued him so ejected &c. from thence hitherto; a replication that the trustees did not enter into or upon the said part of the said tolls or eject &c. the defendant from the possession thereof *modo et forma*, was held good on special demurrer, although it put in issue not only the expulsion, but also the entry, the latter being immaterial and impossible; and that the defendant having mixed up the entry and expulsion as constituting the eviction, the plaintiff had a right to follow him and to accept the issue as tendered; *Palmer* v. *Goodwin*, *in error*, 8 M. & W. 890, reversing the judgment of the Court of Exchequer, 7 M. & W. 486.

(*l*) See the plea, *ante*, 202.

17. On Records.

To a plea of *nul tiel record* in the same Court stating the record. (*m*)

Commencement as ante, 451, *second form.*] Saith, that there is such a record of the said recognizance, [*or if a judgment, say*, " recovery,"] remaining in the said Court of our said lady the queen, before the queen herself, [*or in C. P.* " of the Bench aforesaid,"] as he the plaintiff hath above in his said declaration in that behalf alleged. (*n*) And this the plaintiff is ready to verify by the said record of —— Term, in the —— year of the reign of our said lady the queen, in the —— roll, and he prays that the said term and roll aforesaid may be inspected and seen by the said Court [*or in C. P.* " by the justices,"] here. And because the said Court [*or in C. P.* " the said justices,"] are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, before our said lady the queen, at Westminster, until —— [*or when by original in Q. B.* " until —— wheresoever &c."] to hear the judgment of the said Court thereupon, for that the said Court of our said lady the queen now here are not yet advised thereof &c. [*or in C. P.* " a day is therefore given to the parties aforesaid here until —— to hear the judgment thereupon, for that the said justices here are not advised thereof" &c.]

The like in a *different* Court. (*o*)

Commencement as ante, 451, *second form.*] Saith, that there is such record of the said recognizance, [*or if a judgment*, " recovery,"] remaining in the said Court of our said lady the queen, before the queen herself, [*or* " of the Bench aforesaid,"] as the plaintiff hath above in his said declaration in that behalf alleged; and this the plaintiff is ready to verify by the said record when, where, and in such manner as the Court [*or in C. P.* " the justices,"] here shall direct and award, and he prays that the said record may be seen and inspected by the Court [*or in C. P.* " by the said justices,"] here; and because the plaintiff hath not the said record now here in Court, he is commanded to have the same here, on &c. and that he fail not at his peril, the same day is given to the defendant at the same place, [*or in C. P.* " here," &c.

To plea of no *ca. sa.* against principal, setting out *ca. sa.* (*p*)

Commencement as ante, 451, *second form.*] Saith, that the plaintiff, after the recovery of the said judgment, and before the commencement of this suit, to wit, on the —— day of ——, in the —— year of the reign of our said lady the queen, sued and prosecuted out of the Court of our said lady the queen,

(*m*) See the plea, *ante*, 211, and the forms of replications, 7 Wentw. 68; 1 Rich. C. P. 441; 2 Rich. C. P. 218; Lil. Ent. 182, 404, and 474; 1 Saund. 92, 93; Tidd's forms, 4th edit. 304; Com. Dig. Pleader, 2 W. 13; and as to the form of this replication, 2 Marsh. 354. It may be as well to observe that a recognizance is not a record until it is enrolled; 1 B. & Ald. 153. The forms vary from the above in 1 Rich. C. P. 441; 2 Rich. C. P. 218; 1 Lil. Ent. 182, 183. The conclusion is thus:—" *And this the plaintiff is ready to verify by the said record, and he prayeth that the said record may be seen and inspected by the Court* [or " *justices*"] *here, and because the plaintiff hath not the said record now ready here in Court, it is told by the said Court here to the plaintiff, that he have the said record here on ——, the same day is given to the defendant here, &c.*"

(*n*) Some of the forms here refer to the term and roll, see Tidd's Forms 4th edit. 305; 1 Saund. 92, 93; but others do not, see 2 Rich. C. P. 218; 7 Wentw. 68.

(*o*) See forms, 7 Wentw. 114; 1 Saund. 92, 93; Tidd's Forms, 4th edit. 305.

(*p*) See the plea, *ante*, 211, and the forms of replications, 7 Wentw. 69, and Index, 631; Clift. Ent. 188; and see pleadings in *Darling* v. *Gurney*, 2 Dowl. 101; 2 Crom. M. & Ros. 226, S. C.; 7 Taunt. 30. That the conclusion, praying that the record may be inspected, is proper, see *Jackson* v. *Wickes*, 7 Taunt. 30; 2 Marsh. 354, S. C. The defendant cannot rejoin that the *ca. sa.* did not lie in the sheriff's office four clear days; 7 B. & C. 800.

On Records.

before the queen herself, the said Court then and still being holden at Westminster, in the county of Middlesex aforesaid, a certain writ of our said lady the queen, called a *capias ad satisfaciendum*, upon the said judgment against the said E. F., directed to the sheriff of ——, (being the county in which the *venue* in the said action against the said E. F. was (*q*) laid,) by which said writ our said lady the queen commanded the said sheriff of (*r*) —— that he should take the said E. F. if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lady the queen at Westminster, on ——, to satisfy the plaintiff £—— for his damages which he had sustained, as well by reason of the not performing certain promises then lately made to the plaintiff by the said E. F. as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted, as appeared to our said lady the queen of record; and that the said sheriff should have there that writ. Which said writ afterwards, and before the said return thereof, to wit, on &c. was delivered by the plaintiff to —— Esq., who then and from thenceforth, until and at and after the said writ was returned, was sheriff of —— aforesaid, to be executed in due form of law. And afterwards, according to the course and practice of the said Court, to wit, on &c. [*the day the writ was returned,*] before our said lady the queen at Westminster, came the plaintiff in his own proper person, and the said sheriff, to wit, —— Esq. on that day returned to the said Court at Westminster aforesaid, on the said writ, that the said E. F. was not found in his bailiwick, as by the said writ of *capias ad satisfaciendum*, and the return thereof duly affiled (*s*) and remaining of record in the said Court of our said lady the queen, more fully appears. And this the plaintiff is ready to verify by the said record as the Court shall direct, and he prays that the said record may be seen and inspected by the Court here; and because the Court is not yet advised what judgment to give in the premises, a day is given to the said parties here until the —— day of —— next to hear the judgment of the said Court thereupon, &c. (*t*)

To plea of death of principal before return of *ca. sa.* stating a *ca. sa.* and return, and that the principal was then living. (*u*)

Commencement as ante, 451, second form.] Saith, that after the recovery of the said judgment against the said E. F. and before the commencement of this suit, to wit, on the —— day of —— in the —— year of the reign of our lady the now queen, he the plaintiff sued and prosecuted, &c. [*State the issuing of the ca. sa. and the sheriff's return of* non est inventus, *and the reference to the writ and the return as in the above form.*] And the plaintiff further saith, that the said E. F., at the time of issuing the said writ of *capias ad satisfaciendum*, and at the return thereof, was living. And this the plaintiff is ready to verify, &c. (*x*)

(*q*) If this be not so, the defendant may traverse the allegation or rejoin the fact; 16 East, 39.

(*r*) Examine carefully with the writ of *ca. sa.*

(*s*) *Semble*, the allegation of filing is unnecessary; Tidd's Prac. 9th edit. 1099.

(*t*) As to conclusion, see *ante*, 461; 2 Marsh. 354; 7 Taunt. 30, S. C., which case has been since fully confirmed by the Court of King's Bench on special demurrer; but see 2 T. R. 576.

(*u*) See the plea, *ante*, 211, and the forms of replications, Morg. 645; 2 East, 312; 7 Wentw. Index, 631; Tidd, 9th edit. 1099.

(*x*) *Semble*, that this replication, which states a new fact, should conclude with a verification; 2 T. R. 576; Morg. 545, 546; but see 2 Marsh. 570, and note, *supra*.

18. On Judgments. (*y*)

See the pleas, *ante*, 213, and replication, 7 Wentw. Index, 632. The replications to the plea of *nul tiel record* are precisely as *ante*, 461.

See *M'Cormick* v. *Mellon*, 1 Crom. M. & Ros. 525.

Replication to a plea that judgment was satisfied by taking defendant in execution, that the *ca. sa.* was irregular, wherefore defendant was discharged out of custody by a judge's order. (*z*)

19. On Statutes.

Commencement as ante, 451, *second form.*] Saith, that the said writ of capias in the said [second] plea mentioned was sued out, and the said rule of the said Court and recovery in that plea mentioned were had and obtained, by fraud and covin, contrary to the form of the statute in such case made and provided. And this the plaintiff is ready to verify, &c.

To plea of compromise by rule of Court, that it was obtained by fraud. (*a*)

Commencement as ante, 451, *second form.*] Saith, that the said judgment of conviction in the said plea to the said [first] count of the said declaration mentioned was had and obtained by fraud and covin. And this the plaintiff is ready to verify, &c.

To a plea of former conviction, that it was obtained by fraud. (*b*)

(*y*) This replication must conclude with a verification; 2 T. R. 570.

(*z*) See *Collins* v. *Beaumont*, 10 A. & E. 226; 2 P. & D. 363, S. C. If a writ of *ca. sa.* is set aside for irregularity, the plaintiff is not bound to proceed by *scire facias* or action on the judgment, but may at once take the defendant again on a fresh writ of *ca. sa.*; *Merchant* v. *Frankis*, 2 G. & D. 473.

(*a*) See the plea, *ante*, 217, and the forms, 7 Wentw. Index, 632; and 4 Hen. 7, c. 20; Bac. Abr. Actions, *Qui tam*, D.

(*b*) See the plea, *ante*, 218, and the preceding note.

XIX. REPLICATIONS TO PLEAS IN COVENANT.

To plea of licence, denying thelicence. (*a*) Conclusion to the country.

The similiter and the commencement of the replication to a special plea in covenant are the same as in assumpsit, ante, 422.] Because he saith, that the defendant of his own wrong, and without the leave or licence of the plaintiff to the defendant for that purpose first given and granted, did plough and break up &c. [*Enumerate the acts complained of, as in the declaration.*] And this the plaintiff prays may be inquired of by the country, &c.

Other replications.

As the pleas in covenant most frequently conclude to the country, few special replications occur in practice, and it is sufficient to refer to the forms, indexed in 5 Wentw. Index, cii. to cxliv.

Replication *de injurid.* (*b*)

Commencement of replication to a special plea as ante, 422.] Saith, that the defendants of their own wrong, and without the cause alleged in the said plea, committed the said breach of covenant in manner and form as the plaintiff hath in his said declaration alleged. And this the plaintiff prays may be inquired of by the country, &c.

To a plea to declaration for breach of covenant, that before breach defendant assigned away his interest, replication, that breach was committed before assignment, and whilst defendant was assignee. (*c*)

And as to the plea of the defendant by him above pleaded, the plaintiff says, that the said breach of covenant alleged and complained of in the said declaration was committed by the defendant after the said assignment to him in the said declaration mentioned, and whilst he the defendant continued such assignee, and before the making or signing of the said alleged indenture of assignment in the said —— plea mentioned. And this the plaintiff prays may be inquired of by the country, &c.

To a plea to declaration for not completing purchase, that plaintiff did not tender conveyances, replication, that defendant could not deduce good title. (*d*)

And as to the plea of the defendant by him —— above pleaded, the plaintiff saith, that the defendant did not, on or before the said —— day of ——, A.D. ——, or before the said —— day of ——, or at any time since the making of the said articles of agreement hitherto, although duly requested so to do, deduce a good title to the said premises as by the said articles of agreement he was bound to do, wherefore the plaintiff did not nor could, on or before the said —— day of ——, or at any time, prepare or tender, or cause to be prepared or tendered, such conveyances as in the —— plea were mentioned, as he otherwise would have done. And this the plaintiff is ready to verify, &c.

Conclusion with a verification.

The conclusion of a replication with a verification is as follows:] And this the plaintiff is ready to verify, &c.

(*a*) See the plea, *ante,* 220, and the forms 9 Wentw. 24; see the replications *de injurid,* 3 Wentw. 423, 424.

(*b*) See *Rickards* v. *Murdoch,* 10 Bar. & Cres. 527, and cited in *Crisp* v. *Griffith,* 3 Dowl. 756; and see the replication *de injurid* in assumpsit, *ante,* 422.

(*c*) See *Harley* v. *King,* 2 Crom. M. & Ros. 19.

(*d*) See other pleadings and replications, *Rippinghall* v. *Lloyd,* 5 Bar. & Adol. 747.

XX. REPLICATIONS IN DETINUE.

To plea that goods were deposited by plaintiff with defendant, as security for a debt due to defendant, that plaintiff tendered debt before action, and defendant refused to return goods.

And as to the plea of the defendant by him —— above pleaded, the plaintiff says, that after the delivery of the said goods and chattels to the defendant as such pledge and security as aforesaid, and before the commencement of this suit, to wit, on &c. he the plaintiff was ready and willing and then tendered and offered to pay to the defendant a large sum of money, to wit, the said sum of £—— in satisfaction and discharge of the said debt or sum of £——, for which the said goods and chattels were so delivered to the defendant as such pledge and security as aforesaid, and then requested the defendant to deliver up and return to the plaintiff the said goods and chattels; but the defendant then neglected and refused so to do, and kept and detained and still doth detain the same in manner and form as in the declaration alleged. And this the plaintiff is ready to verify, &c.

To plea setting up a lien for £15 for work, &c., replication of tender of 10*s.* and that this sum was the reasonable price and value of the work. (*a*)

And as to the plea of the defendant by him [secondly] above pleaded, the plaintiff says, that after the milling and preparing the said cloths as in the said [second] plea mentioned, he the plaintiff tendered and offered to pay the defendant the sum of 10*s.*, parcel of the said sum of £15, being the price and value of the work done by the defendant in milling and preparing the said cloths, which the defendant refused to accept; and as to the residue of the said sum of £15, the plaintiff says, that the said sum of 10*s.* and no more was the reasonable price and value of the work in the plea mentioned, and the only sum due and owing to the defendant in respect thereof at the time of the detention. And this the plaintiff is ready to verify, &c.

(*a*) See *Coombs* v. *Noad*, 10 M. & W. 127.

XXI. REPLICATIONS IN CASE.

IN CASE.

Replication to plea, confessing causes of action in certain counts, and general issue to residue, taking judgment for causes of action confessed, and *similiter* to general issue, and award of *venire* as well to try issue as to assess damages to cause of action confessed.

AND the plaintiff, as to the said plea of the defendant by him above pleaded, and of which he hath put himself upon the country, doth the like; and because the defendant hath, as to the [first and second] counts of the said declaration, confessed the said action of the plaintiff, the plaintiff prays judgment for his damages by him sustained on occasion of the committing thereof to be adjudged to him &c. and thereupon it is considered by the Court here, that the plaintiff ought to recover against the defendant his damages by him sustained by reason of the committing of the said grievances in the said [first and second] counts mentioned, but because it is unknown to the Court here what damages the plaintiff hath sustained on occasion thereof, and because it is convenient and necessary that there be but one taxation of damages in this suit, therefore let such taxation and the giving of judgment in this behalf be stayed until the trial of the issue above joined between the parties aforesaid, and as well to try the said issue as to inquire what damages the plaintiff hath sustained on occasion of the committing of the said grievances in the said [first and second] counts of the said declaration mentioned, the sheriff is commanded that he cause to come here, on the —— day of ——, twelve &c. by whom &c. and who neither &c. to recognise &c. because as well &c.

To pleas justifying words, *de injuriâ*.

Similiter to the general issue, as ante, 422.] And as to the pleas of the defendant by him [secondly and thirdly] above pleaded, the plaintiff saith, that the defendant, at the said time when &c. in the said [first and second] counts mentioned, of his own wrong, and without the cause by the defendant in his said [second and third] pleas or either of them respectively mentioned, did commit the said grievances in the introductory part of those pleas mentioned, in manner and form as the plaintiff hath above thereof complained against the defendant. And this the plaintiff prays may be inquired of by the country, &c.

Replication to plea in case under 2 & 3 W. 4, c. 71, of enjoyment of an easement for 40 years, showing a *life estate* in answer to such 40 years use.

See form in *Wright* v. *Williams*, 1 Tyr. & Gr. 375; replication held bad, for not showing that plaintiff was the party entitled to the reversion expectant upon such life estate.

FOR ESCAPES.

FOR ESCAPES.

Replication to plea in action for escape, that defendant, of his own wrong [untarily per-

Commencement as ante, 422.] Says, that after the commitment of the said E. F. to the custody of the defendant in execution as aforesaid, that is to say, on the —— day of —— in the —— year of the reign of our said lady the queen [the defendant then and still being keeper of the Queen's

Prison as aforesaid] he the defendant, of his own wrong (*c*) permitted and suffered the said E. F. to go at large whither he would and to escape out of the custody of the defendant, in manner and form as the plaintiff hath above complained against him; without this, that the said E. F. forcibly and without the knowledge, consent or permission of the defendant, and against his will, escaped from and out of the custody of him the defendant as such [keeper] as aforesaid, in manner and form as the defendant hath in his said plea by him secondly above pleaded in bar alleged. And this the plaintiff prays may be inquired of by the country, &c.

FOR ESCAPES.

mitted prisoner to escape, and traverse of the prisoner's forcible escape against defendant's will.

Replication to first plea, similiter; to second plea, the plaintiff, admitting that the escape was without the privity of the defendant, and that the return to prison was voluntary, alleges,] that the said E. F. had not from thenceforth been kept and detained in the custody of the defendant, but that after he the said E. F. had so returned into custody, and after the defendant had notice of the former escape, and before the commencement of this suit, the defendant permitted and suffered the said E. F. to escape and go at large, in manner and form as the plaintiff hath above complained against the defendant, (*e*) which said last mentioned escape is another and different escape than the escape mentioned in the plea of the defendant so by him lastly above pleaded in bar as aforesaid, and was and is the very same identical escape for which the plaintiff brought his aforesaid action. And this the plaintiff is ready to verify, &c.

Replication to plea in action for escape, that after such escape and return, the prisoner again escaped, for which plaintiff sues. (*d*)

Commencement as ante, 422.] Saith, that the now defendant did not before the commencement of this suit retake the said E. F. upon the said pursuit, or again have or detain him the said E. F. in the custody of the now defendant in execution at the suit of the plaintiff for the damages, costs and charges so by him recovered as aforesaid, by virtue of the said commitment of the said E. F. in execution as aforesaid, in manner and form as the defendant hath above in his said plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

Replication to a plea of voluntary escape and recaption, that the writ was issued against him before prisoner's recaption.

Commencement as ante, 422.] Saith, that the said E. F. did not, after the said escape in the said declaration mentioned, and before the commencement of this suit, return back again into the custody of the defendant, nor did the defendant, at the time of the commencement of this suit, keep or detain the said E. F. in his custody as such keeper as aforesaid, in execution at the suit of the plaintiff, under and by virtue of the said commitment and receipt in execution as aforesaid, but on the contrary thereof the said E. F. at the time of the commencement of this suit, continued so escaped and at large out of the custody of the defendant as such keeper as aforesaid. And this the plaintiff prays may be inquired of by the country, &c.

Replication to a plea of a voluntary return, that the writ was issued before the return.

(*c*) *Quære*, if it should not be alleged, that the defendant "*voluntarily* permitted," &c.

(*d*) See 1 B. & P. 414.

(*e*) What follows in this plea is not, perhaps, strictly necessary. The replication might shortly traverse the allegation in defendant's plea, that since the escape he had kept the prisoner safely; 1 B. & P. 417. As to the evidence requisite on part of plaintiff, and that he must, on a traverse of the above allegation, prove the *prior* or first escape, see 1 B. & P. 418, n. (*a*), and *id.* Index, "*Evidence*," pl. 10.

XXII. REPLICATIONS TO PLEAS IN TROVER.

In Trover.

Replications, *similiter* to 1st, 2d and 3d pleas. (*a*)

And the plaintiffs, as to the pleas of the defendants by them firstly, secondly, and thirdly above pleaded, and whereof they have put themselves upon the country, &c. do the like.

To 4th plea. That the assignment to C. was in contemplation of bankruptcy and a fraudulent preference, with a traverse that the assignment was for a sufficient consideration.

And as to the plea of the defendants by them fourthly above pleaded, the plaintiffs say, that the said F. M. the younger made the said assignment to the said T. C. voluntarily, and in contemplation of becoming such bankrupt as aforesaid, and with a view and intention of giving a fraudulent preference to the said T. C. over the said other creditors of the said F. M. the younger, without this, that the said F. M. the younger, for a *bonâ fide* good, valuable, and sufficient consideration, made the said assignment to the said T. C. in manner and form as in the said fourth plea mentioned. And this the plaintiffs pray may be inquired of by the country, &c.

To 5th plea. *De injuriâ*, in effect a denial of the joint interest of C. and bankrupt.

And as to the plea of the defendants by them fifthly above pleaded, the plaintiffs say, that the defendants, of their own wrong, and without the cause by them in the said fifth plea mentioned, committed the said grievance as to the said goods, chattels and effects, in manner and form as in the said first count is alleged. And this the plaintiffs pray may be inquired of by the country, &c.

To 6th plea. Denial of M. having deposited the goods for a sufficient consideration with C.

And as to the plea of the defendants by them sixthly above pleaded, the plaintiffs say, that the said F. M. the younger did not, for the consideration in that plea in that behalf mentioned, deposit the said deeds, writings, goods, chattels and effects in the said first count mentioned, as a security for the repayment of the said money so due and owing, as in that plea in that behalf mentioned, and upon the terms and agreement therein alleged, in manner and form as the defendants have therein alleged. And this the plaintiffs pray may be inquired of by the country, &c.

To 7th plea. That after M. deposited the lease with T. he paid off the debt.

And as to the plea of the defendants by them seventhly above pleaded, the plaintiffs say, that the said F. M. the younger, before the said time when &c. in the said first count mentioned, and after the said delivery to and deposit with the said F. T. of the said indenture of lease in that plea mentioned, to wit, on the —— day of ——, in the year of our Lord 18—, paid to the said F. T. the said sum of money in the said seventh plea in that behalf mentioned, as a pledge and security for the payment of which the said

(*a*) See the pleas, *ante*, 280 to 288.

indenture was so delivered and deposited with the said F. T. as therein is alleged. And this the plaintiffs are ready to verify, &c.

To 8th plea. Admits the judgment and *fi. fa.*, but *de injuriâ* as to the residue, i. e. denial of assignment of lease by the sheriff to T.

And as to the plea of the defendants by them eighthly above pleaded, the plaintiffs say, that though true it is that the said judgment in that plea mentioned was had and recovered by the said F. T. against the said F. M. the younger, and that the said writ of *fieri facias* was sued and prosecuted out of the said Court and delivered to the said sheriff in manner and form as the defendants have in the said eighth plea alleged; for replication, nevertheless, in this behalf the plaintiffs say that the defendants, at the said time when &c. in the said first count mentioned, of their own wrong, and without the residue of the cause in the said eighth plea mentioned, did commit the said grievance in the introductory part of the said eighth plea mentioned, in manner and form as in the said first count is alleged. And this the plaintiffs pray may be inquired of by the country, &c.

To plea, denial that the defendants by the authority of T. converted the lease, &c.

And as to the plea of the defendants by them [lastly] above pleaded, the plaintiffs say, that the defendants did not, as the servants of the said F. T. and by his command, commit the said grievances in the introductory part of the said last plea mentioned, in manner and form as in that plea is alleged. And this the plaintiffs pray may be inquired of by the country, &c.

To plea by sheriff, of seizure of bankrupt's effects under *fi. fa.*, replication, that the judgment was on a warrant of attorney (*b*).

See replication, *Rawdon* v. *Wentworth*, 10 M. & W. 36; 2 Dowl. N. S. 287, S. C.; *Whitmore* v. *Robertson*, 8 M. & W. 463.

Replication to plea of leave and licence in action by assignees of insolvent, on a count for a conversion before the insolvency, that the insolvent made a voluntary assignment within 3 months before his imprisonment, and that he gave the leave and licence for the purpose of giving effect to the assignment. (*c*)

And as to the plea of the defendant by him [fourthly] above pleaded, the plaintiffs say, that before the leave and licence in that plea mentioned was given and granted by the said R. F. to the defendant, and within three months before the commencement of the imprisonment of the said R. F., for his discharge from which he petitioned the Insolvent Court, to wit, on the —— day of ——, A. D. ——, by an indenture then made between the said R. F. of the one part, and the defendant of the other part, which said indenture &c. [*profert*] the said R. F. voluntarily, and contrary to the form of the statute in such case made and provided (*d*), conveyed, assigned and transferred the goods in the [said first count of the] declaration mentioned to the defendant upon certain trusts, to and for the use, benefit and advantage of the defendant, then being a creditor of the said R. F., and of other persons, creditors of the said R. F., who should become parties to the said indenture, as by the

(*b*) The assignees of a bankrupt are entitled to recover in trover goods *bonâ fide* seized by an execution creditor under a *fi. fa.* on a judgment upon a warrant of attorney after a secret act of bankruptcy, but not sold until after the date and issuing of the fiat, and notice thereof; and the statute 2 & 3 Vict. c. 29, does not protect such an execution, *Whitmore* v. *Robertson*, 8 M. & W. 436; *Skey* v. *Carter*, *in error*, 11 M. & W. 571; *Rawdon* v. *Wentworth*, 10 M. & W. 36; 2 Dowl. N. S. 287, S. C.; and plea, *ante*. See also *Cheston* v. *Gibbs*, 2 M. & W. 111; 3 Dowl. N. S. 420, S. C. A replication to a similar plea, that the bankrupt caused the goods to be taken in execution, with intent to defeat and delay his creditors, and thereby committed an act of bankruptcy, and that after the execution the defendant converted the goods *quæ est eadem*, &c., is good, at least by way of confession and avoidance; but would, it seems, be bad on special demurrer, as an informal new assignment, and is open to objection on the ground of duplicity; *Belcher* v. *Magnay*, 12 M. & W. 102; 3 Dowl. N. S. 441, S. C.

(*c*) See *Jackson* v. *Thompson*, 2 Q. B. Rep. 887; 2 G. & D. 598, S. C.

(*d*) 1 & 2 Vict. c. 110, s. 59.

In Trover.

the defendant as in the declaration alleged. And this the plaintiffs pray may be inquired of by the country, &c.

Replication to plea in trover, that intestate had *bona notabilia* in several dioceses, averring *bona notabilia* in one diocese. (*h*)

And the plaintiffs, as to the said plea of the defendant [lastly] above pleaded, say, that the said L. at the time of his death had not any goods, chattels, rights or credits to the value of £—— in the diocese of [Chester] aforesaid, as by the said plea is above alleged. And this the plaintiffs pray may be inquired of by the country, &c.

(*h*) See the plea and notes, *ante*, 288.

XXIII. PLEAS IN BAR IN REPLEVIN.

1. In General.

In General.

And the plaintiff, as to the said plea of the defendant by him [first] above pleaded, and whereof he hath put himself upon the country, doth the like.

Similiter to *non cepit.*

And the plaintiff, as to the avowry of the defendant, saith, that the defendant ought not to avow the taking of the said cattle [*or* "goods and chattels," *as in the declaration*] in the said place [*as in the declaration*] in which &c. and justly &c. because he saith that &c.

Commencement of a plea in bar to an avowry. (*a*)

And the plaintiff, as to the cognizance of the defendant, saith, that the defendant ought not, as bailiff of the said E. F., to acknowledge the taking of the said cattle [*or* "goods and chattels," *as in the declaration*] in the said place [*as in the declaration*] in which &c. and justly &c. because he saith that &c.

The like to a cognizance. (*b*)

And the plaintiff, as to the avowry and cognizance of the said C. D. and E. F. by them [first] above made, saith, that the said C. D. in his own right ought not to avow, and the said E. F. as bailiff of the said C. D. ought not to acknowledge, the taking of the said cattle, goods and chattels [*as in the declaration*] in the said place [*as in the declaration*] in which &c. and justly &c. because he saith that &c.

The like to an avowry and cognizance.

And for a further plea in this behalf to the said avowry [*or* "cognizance"] of the said C. D. the plaintiff saith, that the said C. D. ought not to avow [*or* "as bailiff of the said E. F. ought not to acknowledge"] the taking of the said cattle, goods and chattels [*as in the declaration*] of the plaintiff in the said place [*as in the declaration*] in which &c. and justly &c. because he saith that &c.

Commencement of a second plea in bar.

And this the plaintiff prays may be inquired of by the country, &c.

Conclusion to the country.

And this the plaintiff is ready to verify; wherefore inasmuch as the defendant hath above acknowledged the taking of the said cattle [goods and chattels, *as in the declaration*] in the said place [*as in the declaration*] in

Conclusion with a verification. (*c*)

(*a*) See forms, Plead. A. 470, 476, 483; Morg. 593.

(*b*) See a form, Plead. A. 472.

(*c*) See form, Plead. A. 473, 478, 484; 2 Rich. C. P. 342, 354; Morg. 594, 595, 597.

IN TROVER.

the defendant as in the declaration alleged. And this the plaintiffs pray may be inquired of by the country, &c.

Replication to plea in trover, that intestate had *bona notabilia* in several dioceses, averring *bona notabilia* in one diocese. (*h*)

And the plaintiffs, as to the said plea of the defendant [lastly] above pleaded, say, that the said L. at the time of his death had not any goods, chattels, rights or credits to the value of £—— in the diocese of [Chester] aforesaid, as by the said plea is above alleged. And this the plaintiffs pray may be inquired of by the country, &c.

(*h*) See the plea and notes, *ante*, 288.

XXIII. PLEAS IN BAR IN REPLEVIN.

1. In General.

In General.

And the plaintiff, as to the said plea of the defendant by him [first] above pleaded, and whereof he hath put himself upon the country, doth the like.

Similiter to *non cepit*.

And the plaintiff, as to the avowry of the defendant, saith, that the defendant ought not to avow the taking of the said cattle [*or* "goods and chattels," *as in the declaration*] in the said place [*as in the declaration*] in which &c. and justly &c. because he saith that &c.

Commencement of a plea in bar to an avowry. (*a*)

And the plaintiff, as to the cognizance of the defendant, saith, that the defendant ought not, as bailiff of the said E. F., to acknowledge the taking of the said cattle [*or* "goods and chattels," *as in the declaration*] in the said place [*as in the declaration*] in which &c. and justly &c. because he saith that &c.

The like to a cognizance. (*b*)

And the plaintiff, as to the avowry and cognizance of the said C. D. and E. F. by them [first] above made, saith, that the said C. D. in his own right ought not to avow, and the said E. F. as bailiff of the said C. D. ought not to acknowledge, the taking of the said cattle, goods and chattels [*as in the declaration*] in the said place [*as in the declaration*] in which &c. and justly &c. because he saith that &c.

The like to an avowry and cognizance.

And for a further plea in this behalf to the said avowry [*or* "cognizance"] of the said C. D. the plaintiff saith, that the said C. D. ought not to avow [*or* "as bailiff of the said E. F. ought not to acknowledge"] the taking of the said cattle, goods and chattels [*as in the declaration*] of the plaintiff in the said place [*as in the declaration*] in which &c. and justly &c. because he saith that &c.

Commencement of a second plea in bar.

And this the plaintiff prays may be inquired of by the country, &c.

Conclusion to the country.

And this the plaintiff is ready to verify; wherefore inasmuch as the defendant hath above acknowledged the taking of the said cattle [goods and chattels, *as in the declaration*] in the said place [*as in the declaration*] in

Conclusion with a verification. (*c*)

(*a*) See forms, Plead. A. 470, 476, 483; Morg. 593.

(*b*) See a form, Plead. A. 472.

(*c*) See form, Plead. A. 473, 478, 484; 2 Rich. C. P. 342, 354; Morg. 594, 595, 597.

In General.

which &c. he the plaintiff prays judgment and his damages by reason of the taking and unjustly detaining the same to be adjudged to him, &c.

The like to an avowry and cognizance.

And this the plaintiff is ready to verify; wherefore inasmuch as the said C. D. in his own right hath avowed, and the said E. F. as bailiff of the said C. D. hath acknowledged, the taking of the said [cattle] goods and chattels in the said place in which &c. he the plaintiff prays judgment and his damages by reason of the taking and unjustly detaining thereof to be adjudged to him, &c.

For Rent.

2. For Rent.

Traverse of the demise. (*e*)

Commencement of plea in bar as ante, 473.] Because he saith, that the plaintiff [*or* " E. F."] did not hold or enjoy the said [dwelling-house] in which &c. with the appurtenances, as tenant thereof to the said C. D. [*or* " the said G. H."] under the alleged demise thereof in the said avowry [*or* " cognizance"] mentioned, in manner and form (*f*) as the said C. D. hath above in his said avowry [*or* " cognizance"] in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c. (*g*)

No rent in arrear. (*h*)

Commencement of plea in bar as ante, 473.] Because he saith, that no part of the alleged rent in the said avowry [*or* " cognizance"] mentioned was or is in arrear from the plaintiff to the said C. D. [*or* " G. H."] in manner and form as the said C. D. hath in his said avowry [*or* " cognizance"] in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

That defendant was not bailiff.

Commencement of plea in bar as ante, 473.] Because he saith, that the said C. D. at the said time when &c. was not the bailiff of the said E. F. in manner and form as the said C. D. hath above in his said cognizance in that

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(*e*) As to this plea in bar, see 1 Saund. 347 c, note 4; 2 Leon. 169. Under this plea in bar, when the party distraining claims derivatively from the lessor, the plaintiff may dispute the derivative title; 6 Taunt. 202. But generally the plaintiff cannot dispute his landlord's title; see the cases in Chit. jun. on Contracts, 99; 9 Barn. & Cres. 245; 8 Barn. & Cres. 471; *Hall* v. *Butler*, 2 P. & D. 374. If the tenant (plaintiff) has paid the rent to a superior landlord under a threat of distress, he should plead specially; 6 Taunt. 524. The above plea disputes the tenancy as stated in the avowry. If the plaintiff succeeds on this plea, the plea of *rien en arrere* is immaterial; 2 B. & Ald. 546. Infancy may be pleaded with this plea, or the plea of *rien en arrere*; 5 Taunt. 340; 1 Marsh. 74, S. C. Unless there be an actual demise to the tenant at a fixed rent the landlord cannot distrain, but must sue for use and occupation; 2 Taunt. 148; 5 B. & Ald. 322; and such a defence is available under this plea.

In the case of *Jones* v. *Powell*, 5 B. & C. 647; 8 D. & R. 416, S. C., in replevin, the defendant avowed that he demised the close in which &c. (amongst other things) to A. B., and because the cattle were there he distrained them for rent in arrear. The plaintiff pleaded in bar that the cattle were not *levant* and *couchant* upon the close in which &c. It was held on demurrer that this plea was bad, *first*, for not showing how the cattle came upon the land; *secondly*, for not stating that they were not *levant* and *couchant* upon any part of the lands demised.

(*f*) These words always embrace the terms of the tenancy as stated in the avowry; see 6 Bing. 107.

(*g*) This conclusion to the country is proper; Morg. 593; 1 Saund. 103; Ld. Raym. 641.

(*h*) A plea of distress should aver that satisfaction was had out of it; 4 Moore, 409; 5 Moore, 542. *Quære*, whether payment of a sum by the tenant to an adjoining occupier for a right of way to the demised premises, the landlord having agreed to allow such payment, will support the plea of *riens in arrere*; *Davies* v. *Stacey*, 4 P. & D. 157.

behalf alleged. And this the plaintiff prays may be inquired of by the country, &c. (*i*)

Plea in bar, no reversion in landlord. (*k*)

Because he saith, that the said J. P. the landlord, who distrained before and at the time of the making of the said demise in the said avowry and cognizance mentioned, was possessed of the residue of a certain term of years of and in the said dwelling-house and the said yard in which &c. and of no further estate or interest therein, and that the defendant J. P. demised the said dwelling-house and yard to the plaintiff as in the said avowry and cognizance mentioned, out of his said estate and interest therein, and that the said term of years of the defendant J. P. heretofore and before the said time when &c., to wit, on the —— day of ——, A. D. 18—, ended and determined, and that the said J. P., by reason of the premises at the said time when &c. had not any estate, term or interest of and in the said dwelling-house &c. or any part thereof, without this, that the plaintiff at the said time when &c. held the said dwelling-house as tenant thereof to the defendant J. P. as alleged in the said avowry. And this the plaintiff prays may be inquired of by the country, &c.

That disputes arose between the defendant and C. respecting the title to the premises, and that they submitted their claims to a referee, who decided in favour of C., whereupon the plaintiff paid his rent to C. (*l*)

And the plaintiff, as to the said avowry of the defendant, says, that the defendant ought not to avow the taking of the said goods and chattels in the declaration mentioned, in the said dwelling-house in which &c. and justly &c. because he says that before the said time when &c. to wit, on the day and year in the declaration mentioned, certain disputes and differences had arisen, and were then pending, between the defendant and one Thomas C. touching and concerning the right, title and interest of and into the said undivided third part in the said avowry mentioned of the said dwelling-house in which &c., insomuch that the plaintiff did not know to which of the two he was in law bound to pay his rent in respect thereof, and thereupon, for the putting an end to the said differences, the said defendant and Thomas then, to wit, on the —— day of ——, 18—, and before the time when &c. respectively submitted themselves to the opinion of one E. P. C. to be given of and concerning the said differences, and in consideration thereof, and that the said Thomas, at the request of the defendant, had then promised the defendant to abide by the opinion of the said E. P. C. to be so given in and upon the premises, in all things therein contained on his part to be abided by, the defendant then promised the said Thomas to abide by the same in all things therein contained on his part to be abided by. And the plaintiff in fact says, that the said E. P. C. having taken upon himself

(*i*) *Quære*, whether the plaintiff can traverse this allegation; see *per* Littledale, J., *Whitehead* v. *Taylor*, 2 P. & D. 368; 10 A. & E. 210, S. C.; 4 Vin. Ab. Bailiff, D. p. 1. Evidence of a subsequent ratification and approval of the act will be sufficient, although no prior command was given; 11 Mod. 112; Vin. Ab. Bailiff, D.

(*k*) This must be pleaded in bar; *Hooker* v. *Nye*, 1 Crom. M. & Ros. 258, 260; and see form in *Preece* v. *Corrie*, 5 Bing. 24. See another form, 3 Chitty on Pleading, 1115, 6th ed.

(*l*) See *Davies* v. *Cooper*, 1 G. & D. 573. An avowry justifying a distress under the award of an arbitrator, to whom all matters in difference between the parties had been referred, must aver that the arbitrator had authority to confer a power of distress, or that the right to distrain was one of the matters in difference, and a similar replication in replevin where the avowry was for rent arrear, was held ill on the ground of departure, the defendant in his avowry relying upon the common law right to distrain as for rent service, and in his replication setting up a power of distress given under an award; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898.

For Rent.

the burthen of the said opinion, afterwards and before the said time &c., to wit, on the day and year in the declaration mentioned, gave his opinion between the defendant and the said Thomas of and concerning the said differences, and did thereby give it as his opinion that all right, title and interest of, in and to the said undivided third part in the said avowry mentioned of the said dwelling-house in which &c. was then of right vested in the said Thomas, and not in the said defendant, and that the said defendant had no right, title or interest therein or any part thereof, of which said opinion the defendant afterwards, to wit, on the day and year in the declaration mentioned, and before the said time when &c. had notice, and in pursuance of the said submission the muniments of the said undivided third part of the house, in which &c. were given up to the said Thomas by the consent and approbation of the defendant. And the plaintiff further says, that afterwards, to wit, on the day and year in the declaration mentioned, and before the said time when &c., he, with the consent and approbation of the defendant, did attorn to the said Thomas, and then became and was and from thence hitherto hath been and still is tenant to the said Thomas of the said undivided third part of the said dwelling-house in which &c., without this, that at the said time when &c. the plaintiff held or enjoyed the said undivided third part of the said dwelling-house, in which &c. with the appurtenances, as tenant thereof to the defendant, under the alleged demise thereof in the said avowry mentioned, in manner and form as the defendant has above in the said avowry in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

Payment of rent to ground landlord. (m)

Commencement of plea in bar, as ante, 473.] Because he saith, that the said C. D. from the —— day of —— A. D. ——, and from thence for a long space of time, to wit, from thence until and upon the —— day of —— A. D. ——, held the said [dwelling-house] in which &c. as tenant thereof to one E. F. at and under a certain yearly rent, to wit, the yearly rent or sum of £——, to be paid at the four most usual feasts or days of payment of rent in the year, that is to say, &c. [*here enumerate the quarterly days of payment*] by even and equal portions. And the plaintiff further saith, that before the said time when &c. to wit, on the —— day of —— A. D. —— and on divers other days and times between that day and the —— day of —— A. D. —— divers sums of money of the said yearly rent, in the whole amounting to a large sum of money, to wit, the sum of £——, became and were due and in arrear from the said C. D. to the said E. F.; and thereupon the said E. F. on divers days and times after the said several days and times when the said several sums of money so due and in arrear as aforesaid, and before the said time when &c. required payment of the said several

(m) See 4 T. R. 511. Payment of land-tax, Dougl. 624, 625; and see 6 Taunt. 624; 2 Marsh. 220; *ante*, vol. i. Index, "*Replevin.*" An allegation of payment of land-tax and paving rates for any period preceding the current year is no plea in bar to an avowry for rent in arrear; 1 B. & B. 37; 3 Moore, 287, S. C.; and a plea in bar, stating "*that divers sums of money amounting to a certain sum had been from time to time duly assessed and rated upon the premises for land-tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which the defendant as landlord was liable to bear in respect of the rent,*" was held bad, for not stating the specific periods for which the respective sums were assessed or paid, and in not stating that the payment was made after the rent distrained for had accrued or was accruing due; 3 B. & Ald. 516. As to plea of payment of property-tax, see 1 B. & Ald. 123.

sums of money so due and in arrear as aforesaid of the plaintiff, as being the occupier of the said [dwelling-house] in which &c., and thereupon the plaintiff, in order to prevent the goods and chattels at the said several times being in the said [dwelling-house] in which &c. from being distrained at the said several times when the plaintiff was so required as aforesaid, paid the said several sums of money so due and in arrear from the said C. D. to the said E. F. as aforesaid, which said several sums of money so paid by the plaintiff to the said E. F. as aforesaid, greatly exceed the amount of the rent due and in arrear from him the plaintiff to the said C. D. in manner and form as the said C. D. hath above in his said avowry in that behalf alleged. And this &c. [*Conclude as ante, 473, seventh form.*

That the defendant's title was from a mortgagor, and that the plaintiff was forced to pay the rent to the mortgagee. (*n*)

See *Johnson* v. *Jones*, 9 A. & E. 809; 1 P. & D. 651, S. C.

No rent in arrear as to part, and tender as to the residue. (*o*)

And the plaintiff, as to the said [cognizance] of the said C. D. by him above made, saith, that the said C. D. ought not to acknowledge the taking of the said [goods and chattels] in the said [place] in which &c. and justly, &c. because as to the sum of £—— parcel of the said rent in the said [cognizance] alleged to be due and in arrear and unpaid from the plaintiff to the said E. F. the plaintiff saith, that no part of the said sum of £—— at the said time when &c. was in arrear in manner and form as the said C. D. hath in his said [cognizance] above alleged. And this the plaintiff prays may be inquired of by the country, &c. And as to the sum of £——, residue of the said rent or sum of £—— in the said [cognizance] alleged to be due and in arrear and unpaid from the plaintiff to the said E. F., the plaintiff saith, that after the said —— day of —— A. D. —— [*day when the rent fell due*], and before the said time when &c. to wit, on the —— day of —— in the year aforesaid, the plaintiff tendered and offered to pay to the said E. F. [*or*, "to G. H. then being the bailiff of the said E. F. and by him duly authorised to receive the said rent and make the said distress,"] (*p*) the said sum of £——, which the said E. F. then refused to accept and receive of and from the plaintiff; and that after the said tender and before the said distress was so made and taken as aforesaid, no request or demand of the said sum of £—— was ever made by or on the behalf of the said E. F. And this, &c. [*Conclude with a verification, as ante, 473, seventh form.*

Tender of rent and costs of distress after seizure and before impounding. (*q*)

And the plaintiff, as to the avowry and cognizance of the said G. H. and K. L. by them [first] above made, says, that the said G. H. in his own right ought not to avow, and the said K. L. as bailiff of the said G. H. ought not to acknowledge, the taking of the said carriage and horses in the said close

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(*n*) The plaintiff might, under these facts, plead payment simply, but no prejudice can arise from stating the grounds of the payment; *Johnson* v. *Jones*, 9 A. & E. 809; 1 P. & D. 651, S. C. See also *Taylor* v. *Zamira*, 6 Taunt. 524; *Sapsford* v. *Fletcher*, 4 T. R. 511.

(*o*) As to this plea, see 8 Rep. 147 a; Clift. Ent. 646; Com. Dig. 3 K. 20. See a plea of tender on the land, Morg. 595, 596, 597. See another plea, 4 Taunt. 549. Where to an avowry for rent the plaintiff pleads *non tenuit*, and a tender, the proof of the tender will not support the issue for the defendant on *non tenuit*, without calling in aid the allegations of the plea of tender, which cannot be done; *Knight* v. *M'Dowall*, 4 P. & D. 168.

(*p*) *Query* if this averment be sufficient; see 5 Rep. 76 a; Cro. Eliz. 813; Rol. Rep. 258; Gilb. Distress, 88; Bac. Ab. Tender.

(*q*) See *Thomas* v. *Harries*, 1 M. & G. 695.

For Rent. in which, &c. and justly &c. because he says, that after the taking the said cattle and horses in the said close in which &c. and before the impounding of the same, to wit, on the same day and year in the said declaration mentioned, the plaintiff tendered and offered to pay the defendant K. L., then being the bailiff of the defendant G. H., and by him duly authorised to receive the said rent, and to make the said distress, the said sum of £—— so due for rent as in the said avowry and cognizance mentioned, together with a certain other sum of money, to wit, £——, for the costs and expenses of the taking of the said distress, the said last-mentioned sum then being reasonable and sufficient for the costs and expenses in that behalf, which several sums of money the defendant K. L. then wholly refused to accept from the plaintiff, and afterwards unjustly detained the said cattle and horses against sureties and pledges until &c. in manner and form &c. And this the plaintiff is ready to verify; wherefore &c.

Eviction. (r) *Commencement of plea in bar, as ante,* 473.] Because he saith, that the defendant, after the making of the said demise in the said first avowry mentioned, and before any part of the said rent therein mentioned became due or in arrear, to wit, on &c. A. D. ——, in the county aforesaid, with force and arms entered into [a certain messuage or dwelling-house, parcel of] the said demised premises in the said [avowry] alleged to have been demised, in and upon the possession of the plaintiff thereof, and him the plaintiff from his possession thereof ejected, expelled, put out and amoved, and kept and continued the plaintiff so ejected, expelled, put out, and amoved from his possession thereof, from thence until and upon and after the said —— day of —— A. D. ——. And this, &c. [*Conclude with a verification, as ante,* 473, *seventh form.*

Release of the rent. See *Cooper* v. *Robinson,* 10 M. & W. 694.

Plea in bar to a cognizance for arrear of annuity, stating that there was a defective memorial, and therefore that the annuity is void, because the deed stated the consideration money to have been paid by the principal. (s) And the plaintiff prays oyer of the said [indenture] in the said [cognizance] of the said R. A. above mentioned, and it is read to him in these words following, to wit, this indenture, of five parts, &c. [*here set forth the indenture.*] Which being read and heard, the plaintiff says that the said R. A. ought not to acknowledge the taking of the said goods and chattels in the said [place] in which &c. to be just, because he says, that the said W. Duke of Q. within thirty days of the execution of the said indenture in the said cognizance mentioned and above set forth, to wit, on the —— day of ——, in the year of our Lord ——, caused a certain memorial to be inrolled in the High Court of Chancery at Westminster, as and for a memorial of the said indenture to be inrolled in that Court, in pursuance of the statute in that case made and provided, and which said memorial is as follows, to wit, [*here copy the memorial verbatim*]. As by the record of the said memorial now remaining inrolled in the said High Court of Chancery at Westminster may more fully appear. And the plaintiff further says, that no other memorial of the said indenture in the said cognizance mentioned was inrolled of

(r) See the pleas of eviction and the notes *ante,* and 1 Saund. 204, n. 2.

(s) See a form 1 New Rep. 214, 218; and see *Richards* v. *Tomkins,* 9 Bing. 51; 2 M. & Sel. 56, S. C.

record in the said High Court of Chancery within thirty days of the execution of the same indenture, (*t*) as by the records of the same Court may appear. And the plaintiff further saith, that the said sum of £—— in the said indenture mentioned to be paid to the plaintiff and J. M. by the said Duke of Q. was not paid to them, or either of them, by the said Duke of Q. And this the plaintiff is ready to verify; wherefore &c. [*Conclude with a verification, as ante, 473, seventh form.*

Second plea in bar, denying the payment to the grantors.

And for a further plea in this behalf, the plaintiff says, that the said R. A. ought not to acknowlenge the taking of the said goods and chattels in the said place in which &c. to be just, because he says, that the said Duke, within thirty days of the execution of the said indenture in the said cognizance mentioned and above set forth, to wit, on the —— day of ——, in the year of our Lord ——, caused the said memorial thereof, set forth in the said plea of the plaintiff by him [first] above pleaded in bar, to be inrolled in the High Court of Chancery at Westminster, as by the record of the said memorial now remaining inrolled in her Majesty's High Court of Chancery at Westminster may more fully appear. And the plaintiff further saith, that no other memorial of the said indenture in the said cognizance mentioned was inrolled of record in the said High Court of Chancery within thirty days of the execution of the same indenture, as by the records of the same Court may appear. And the plaintiff further saith, that the said sum of £—— in the said indenture and memorial mentioned to have been paid to the plaintiff and J. M. by the said Duke of Q. was not paid to the plaintiff and J. M. And this the plaintiff is ready to verify; wherefore &c. [*Conclude with a verification, as ante, 473, seventh form.*

Third plea in bar, that the consideration-money was not paid in bank notes.

And for a further plea in this behalf, the plaintiff says, that the said R. A. ought not to acknowledge the taking of the said goods and chattels in the said [place] in which &c. to be just, because he says, that the said Duke of Q. within thirty days of the execution of the said indenture in the said cognizance mentioned and above set forth, to wit, on the said —— day of ——, in the year of our Lord ——, caused the said memorial thereof, set forth in the said plea of the plaintiff by him [first] above pleaded in bar, to be inrolled in the High Court of Chancery at Westminster, as by the record of the said memorial now remaining inrolled in her Majesty's High Court of Chancery at Westminster may more fully appear. And the plaintiff further says, that no other memorial of the said indenture in the said cognizance mentioned was inrolled of record in the said High Court of Chancery within thirty days of the execution of the said indenture, as by the records of the same Court may appear. And the plaintiff further says, that the said sum of £—— in the said indenture mentioned, and by the said memorial alleged to have been paid by the said Duke of Q. to the plaintiff and J. M. in fourteen notes of the Bank of England of £—— each, and numbered as in the said memorial is mentioned, was not, nor was any part thereof, paid by the said Duke of Q. in notes of the Bank of England. And this the plaintiff is ready to verify; wherefore &c. [*Conclude with a verification, as ante, 473, seventh form.*

(*t*) This allegation is necessary; 1 Marsh. Rep. 155; 1 New Rep. 214.

That grantee of annuity became insolvent, and the same passed to his assignees. (u)

See *Count* v. *Ward*, 7 Bing. 608; 5 M. & P. 618, S. C.

Statute of Limitations to avowry and cognizance, as a distress for arrears of annuity. (x)

And for a further plea in this behalf, as to the said avowry and cognizance of the said defendants W. F. and J. S. by them above pleaded, the plaintiff saith, that by reason of any thing alleged, the said J. S. in his own right ought not to avow, and the said W. F., as bailiff of the said J. S., ought not to acknowledge, the taking the cattle in the said declaration mentioned in the said close in which &c. and unjustly &c., because he saith, that the said distress in the said avowry and cognizance mentioned was not made at any time within twenty years next after the time at which the right to make a distress for arrears of the said annuity, yearly rent or sum of £30, first accrued to the defendant J. S. And this he the plaintiff is ready to verify; wherefore, inasmuch as the defendant J. S. in his own right hath avowed, and the defendant W. F., as bailiff of the said J. S., hath acknowledged, the taking of the said cattle in the declaration mentioned in the said close in which &c., he the plaintiff prays judgment and his damages, by reason of the taking and unjustly detaining thereof, to be adjudged to him, &c.

Plea that J. S. deceased, granted annuity to defendant J. S., and made same chargeable on *certain premises*, which he afterwards conveyed and assigned to the defendant J. S. the grantee of the said annuity, whereby annuity *ceased*, and will revoked and annulled as to annuity.

And for a further plea in this behalf, as to the said avowry and cognizance of the defendants J. S. and W. F. by them above made, the plaintiff saith, that by reason of any thing therein alleged, the said J. S. in his own right ought not to avow, and the said W. F., as bailiff to the said J. S., ought not to acknowledge, the taking of the said cattle in the said declaration mentioned, in the said close in which &c. and justly &c., because he the plaintiff saith, that the said J. S., deceased, (late father of the defendant J. S.), in and by his said last will and testament, bearing date, to wit, the day and year in the said avowry and cognizance alleged, ordered and directed that the said annuity or yearly rent or sum of £——, thereby bequeathed to the defendant J. S. as in the said avowry and cognizance mentioned, should be paid and payable out of certain leasehold premises, to wit, his undivided moiety or halfendeal of certain leasehold estates called A. and C., otherwise E., and did in and by his last will and testament charge and subject the said leasehold estates called A. and C., otherwise E., to and with the payment of the said annuity, yearly rent or sum of £—— accordingly, and did thereby declare that in case the said annuity, yearly rent or sum of £——, or any part thereof, should at any time during the life of the defendant J. S. be behind and unpaid for the space of twenty days next over and after any or either of the periods or days of payment whereon the same was therein directed to be paid, being lawfully demanded and then not paid, and then

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(u) Where a landlord distrained the goods of A. on his tenant's premises for rent, and the tenant afterwards became bankrupt and obtained his certificate, it was held on error in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that the certificate did not operate as a release of the rent, and that the landlord had a right in replevin, at the suit of A. to avow for a return of the goods, and that A. could not plead the bankruptcy in bar; *Newton* v. *Scott*, 10 M. & W. 471.

(x) An annuitant under a will must, since the 3 & 4 W. 4, c. 27, have recourse to distress or action within twenty years from the testator's death; *James* v. *Salter*, 5 Dowl. 496; 3 Bing. N. C. 544, S. C. This statute does not apply to rent reserved on a demise; *Grant* v. *Ellis*, 9 M. & W. 113.

and so often it should and might be lawful to and for the defendant J. S. to enter upon the said premises thereby charged with the said annuity, and to distrain for the same or so much thereof as should be so in arrear; and the said testator did thereby further declare that in case the said moiety or halfendeal of the said leasehold estate should prove insufficient to discharge the said annuity of £——, then that such deficiency should be made up out of the rents and profits of his the said testator's freehold premises situate in the county of D.; and the said testator should thereby also in that case charge the same and every part thereof to and with the payment of such deficiency, and give unto the defendant J. S. in case of the non-payment thereof upon the days and times thereinbefore mentioned, such and the like powers of distress for the recovery of the arrears of the said annuity upon the said freehold premises as was thereinbefore by him given to the defendant J. S. in that behalf, upon his the said testator's leasehold estate. And the plaintiff, in fact, further saith, that the said testator did not by his last will and testament or otherwise charge the said annuity on his freehold premises or any part thereof; and that afterwards, and after the making of his said will, and before his decease, to wit, on the —— day of ——, A.D. ——, the said testator duly conveyed, assigned and gave up to the defendant J. S. all the estate and interest of him the said testator of, into or out of the said undivided moiety or halfendeal of the said leasehold estates in the said will mentioned, and whereon the said annuity or yearly rent or sum of £30 was by the said will so charged and chargeable as aforesaid, and revoked and annulled the said devise of the said annuity, yearly rent or sum of £——, in the said will and in the said avowry and cognizance mentioned. And this he the plaintiff is ready to verify; wherefore, inasmuch as the defendant G. S. in his own right hath avowed, and the defendant W. F. as bailiff of the said J. S. hath acknowledged, the taking of the said cattle in the said declaration mentioned, in the said close in which &c., he the plaintiff prays judgment and his damages, by reason of the taking and unjustly detaining thereof, to be adjudged to him &c.

Plea in bar, that annuity was charged on leasehold estates, and in case they were not sufficient, then on *locus in quo*, and that leasehold estates were sufficient. (y)

And for a further plea in this behalf, as to the said avowry and cognizance of the defendants J. S. and W. F. by them above pleaded, the plaintiff saith that, by reason of any thing therein alleged, the said J. S. in his own right ought not to avow, and the said W. F. as bailiff of the said J. S. ought not to acknowledge, the taking of the said cattle in the said declaration mentioned, in the said close in which &c. and justly &c. because he saith that the said J. S. deceased, late father of the said J. S., in and by his last will and testament, bearing date, to wit, the day and year in the said avowry and cognizance alleged, ordered and directed that the said annuity, yearly rent or sum of £30, thereby bequeathed to the defendant J. S., as in the said avowry and cognizance is mentioned, should be paid and payable out of certain leasehold premises, to wit, his undivided moiety or halfendeal of certain leasehold estates, called Astons and Chappels, otherwise Elford; and did, in and by his said last will and testament, charge and subject the said leasehold estates, called Astons and Chappels, otherwise Elford, to and with the payment of

(y) See *James* v. *Salter*, 2 Bing. N. C. 505; see S. C. 3 Bing. N. C. 544; 5 Dowl. 496.

For Rent.

the said annuity or yearly rent or sum of £30 accordingly, and did thereby declare that in case the said annuity or yearly rent or sum of £30, or any part thereof, should at any time during the life of the defendant J. S. be behind and unpaid for the space of twenty days next over or after any or either of the periods or days of payment whereon the same was thereon directed to be paid, being lawfully demanded and then not paid, that then and so often it should and might be lawful to and for the defendant J. S. to enter upon the said premises thereby charged with the said annuity, and to distrain for the same or so much thereof as should be so in arrear. And the said testator did thereby further declare, that in case the said moiety or half-endeal of the said leasehold estates should prove insufficient to discharge the said annuity of £30, then that such deficiency should be made up out of the rents and profits of his the said testator's freehold premises, situate in the county of Devon: and the said testator did thereby also in that case charge the same and every part thereof to and with the payment of such deficiency, and give unto the defendant J. S., in case of the non-payment thereof upon the said days or times thereinbefore mentioned, such and the like powers of distress for the recovery of the arrears of the said annuity upon the said freehold premises as was thereinbefore by him given to the defendant J. S. in that behalf upon his the said testator's leasehold estate. And the plaintiff further saith, that the said testator did not by his last will and testament further or otherwise charge the said annuity on his freehold premises, or any part thereof, and that the said testator afterwards, to wit, on the —— day of ——, A.D. ——, died possessed of the said moiety or halfendeal of the said leasehold estates in the said will mentioned, without revoking or altering his said will; and that the said moiety or halfendeal of the said leasehold estates in the said will mentioned, at the time of the decease of the testator, was and thenceforth hitherto hath remained and continued and still is sufficient to discharge the said annuity of £30 in the said avowry and cognizance mentioned. And this he the plaintiff is ready to verify; wherefore, inasmuch as the defendant J. S. in his own right hath avowed, and the defendant W. F. as bailiff of the defendant J. S. hath acknowledged, the taking of the said cattle in the said declaration mentioned, in the said close in which &c., the plaintiff prays judgment and his damages, by reason of the taking and unjustly detaining thereof, to be adjudged to him &c.

Replication *de injuriâ* to avowry for *poor rate.*

See form of replication and law in *Bardons* v. *Selby*, 1 Crom. & Mees. 500; 3 Bar. & Adol. 2.

3. Damage Feasant.

Damage Feasant.

To avowry damage feasant by freeholder, denial of his title. (z)

Commencement of plea in bar, as ante, 473.] Because he saith, that the said place, [*as in the declaration*] in which &c. now is, and at the said time when &c. was the close, soil and freehold of the plaintiff, and not the

(z) See the avowry, *ante*, 307. As to this plea in bar, see 2 Saund. 206 a, n. 22; Com. Dig. Pleader, 3 K. 22; 1 Co. 64 a. If there be any doubt as to the plaintiff being a freeholder, the plea in bar should merely traverse the defendant's title without stating the plaintiff's, which in all cases is sufficient.

close, soil and freehold of the defendant, [*or* " G. H."] in manner and form as the defendant hath above in his said avowry [*or* " cognizance"] in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To avowry damage feasant by tenant, traverse of the demise. (*a*)

Commencement of plea in bar, as ante, 473.] Because he saith, that the said E. F. in the said avowry [*or* " cognizance"] mentioned, did not demise the said [place] in which &c. to the defendant in manner and form as the defendant hath above in his said avowry in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

Plea that the close in which &c. was not the freehold of J. S. at the time of his death.

And the plaintiff, as to the said avowry and cognizance of the defendants J. S. and W. F. by them above pleaded, saith, that by reason of any thing therein alleged, the said J. S. in his own right ought not to avow, and the said W. F. as bailiff of the said J. S. ought not to acknowledge, the taking of the said cattle in the said declaration mentioned, in the said close in which &c. and justly &c., because he saith that the said close in which &c. was not nor was any part thereof the freehold of the said J. S. (late father of the defendant J. S.); neither did it nor any part thereof continue so until and at the time of the decease of the said J. S., in manner and form as the defendants J. S. and W. F. have in their said avowry and cognizance in that behalf above alleged. And this the plaintiff prays may be inquired of by the country, &c.

To an avowry damage feasant by freeholder or leaseholder, that defendant demised *locus in quo* to plaintiff. (*b*)

Commencement of plea in bar, as ante, 473.] Because he saith, that long before the said time when &c. to wit, on &c., the defendant demised the said place in which &c. with the appurtenances to the plaintiff, to have and to hold the same to the plaintiff from the —— day of ——, in the year last aforesaid, for one year then next following and fully to be complete and ended, and so on from year to year for so long time as the defendant and plaintiff should respectively please; by virtue of which said demise, the plaintiff long before the said time when &c., to wit, on &c. last aforesaid, entered into the said [place] in which &c. with the appurtenances, and became and until and at the said time when &c. was possessed thereof, and being so possessed thereof, the plaintiff afterwards, and during the continuance of the said tenancy, and before the said time when &c., to wit, on &c. put the said cattle in the said declaration mentioned into the said place in which &c. to feed and depasture on the grass there then growing, and which said cattle were lawfully in and upon the said [place] in which &c. feeding and depasturing on the grass there then growing from thence until the defendant of his own wrong, at the said time when &c. during the continuance of the said tenancy, took the said cattle in the said declaration mentioned in and upon the said [place] in which &c. and detained the same against sureties and pledges until &c., in manner and form as the plaintiff hath above complained against the defendant. And this, &c. [*Conclude with a verification, as ante, 473, seventh form.*]

(*a*) See the avowry, *ante*, 308.

(*b*) The demise must be stated according to the facts; see form, *ante*, 308. As to the demise being found variant, see Hob. 72, 73.

DAMAGE FEASANT.

To avowry for distress damage feasant, that plaintiff's cattle escaped into *locus in quo* through the defect of fences which the occupier ought to have repaired. (*c*)

Commencement of plea in bar, as ante, 473.] Because he saith, that the plaintiff, before and at the said time when &c. was lawfully possessed of and in a certain close &c. [*state the plaintiff's possession of the adjoining close, and the obligation of the occupier of* locus in quo *to repair the fence, and that the fence was out of repair, and that plaintiff's cattle thereby escaped into* locus in quo, *as in the form, ante*, 365, *and 2 Saund.* 284, 285; 1 *Taunt.* 529; *and after stating such escape, proceed as follows:*]* and remained therein until the defendant, before the plaintiff had or could have any notice that the said cattle were in the said place in which &c. (*d*) to wit, at the said time when &c. of his own wrong, took the said cattle in the said place in which &c. and unjustly detained the same against sureties and pledges, in manner and form as the plaintiff hath above thereof complained against the defendant. And this, &c. [*Conclude with a verification, as ante*, 473, *seventh form; see 2 Saund. 285 a.*

The like, stating defendant's obligation to keep a gate shut. (*e*)

Commencement of plea in bar, as ante, 473.] Because he saith, that the said [field or place] called &c. now lieth, and at the said time when &c. did lie, and from time whereof the memory of man is not to the contrary hath lain, contiguous and next adjoining on one side thereof to a certain [field or place] called &c., situate and being in the said parish of —— in the county of ——, and separated and divided therefrom by a certain hedge or fence, and in which said hedge or fence, long before and at the said time when &c. there was and still is a certain gate and gateways leading from and out of the said [field or place] called &c. into the said [field or place] called &c. in which &c.; and the plaintiff further saith, that the defendant, and all other the tenants and occupiers of the said [field or place] called &c. in which &c. for the time being, from time whereof the memory of man is not to the contrary, have repaired and maintained, and have been used and accustomed to repair and maintain, and of right ought to have repaired and maintained, and still of right ought to repair and maintain, the said gate or gateway in the said hedge or fence between the said [field or place] called &c. in which &c. and the said [field or place] called &c. as often as occasion hath required, and to keep the said gate or gateway in the said hedge or fence shut and fastened, to prevent the escape of cattle from and out of the said [field or place] called &c. into the said [field or place] called &c. in which &c.; and the plaintiff further saith, that before and at the same time when &c. he the plaintiff was lawfully possessed of and in the said [field or place] called &c., and being so possessed thereof, he the plaintiff, a little before the said time when &c. put the said cattle in the said declaration mentioned, (the same being the cattle of the plaintiff,) into the said [field or place] called &c. to feed and depasture the grass there then growing and being, as it was lawful for him to do for the cause aforesaid; and the plaintiff further saith, that afterwards, and a little before the said time when &c., because the said gate

(*c*) See the form and law, 2 Saund. 284 c, 285, n. 4, 289, n. 7; Plead. A. 476, 7, 8; and the notes to the form, *ante*, 308, and 549. When the occupier of the *locus in quo* is bound to fence against an *highway*, see the form and law, 2 Hen. Bla. 527; 3 Wils. 126. The above form will also serve as a plea in bar to an avowry for rent, and should be pleaded; see 2 Saund. 284 c; 5 B. & C. 647; 8 D. & R. 416, S.C.

(*d*) As to this allegation, see 2 Saund. 285, n. 1; but see form, Pl. A. 476, 7, 8, which omits it.

(*e*) See the note to the last form.

in the said hedge or fence, between the said [field or place] called &c, in which &c. and the said [field or place] called &c. was open and not shut and fastened, the said cattle in the said declaration mentioned, at the same time when &c., strayed and went, without the knowledge and against the will of the plaintiff, from and out of the said [field or place] called &c. into the said [field or place] called &c. in which &c. and remained there until &c [*Conclude as in the preceding form, ante*, 484, *from the asterisk.*

Commencement of plea in bar, as ante, 473.] Because he saith, that the said place in which &c., before and at the said time when &c., and from time whereof the memory of man is not to the contrary, hath been and still is contiguous and next adjoining to a certain common or waste, situate, lying and being in the parish aforesaid in the county aforesaid, and that the defendant, and all other the tenants and occupiers of the said close in which &c. for the time being, from time whereof the memory of man is not to the contrary, hitherto of right have maintained and repaired, and until the neglect hereinafter mentioned have been used and accustomed to maintain and repair, the fence between the said close in which &c. and the said common or waste called ——, when and as often as occasion hath required and should require, to prevent cattle lawfully being in and upon the said common or waste called —— from escaping from and out of the same into the said close in which &c. And the plaintiff further saith, that &c. [*Here state the seisin in fee and prescriptive right of common, as ante*, 376. *If by a copyholder, state the copyhold and right of common, as ante*, 377. *Or if the plaintiff be a tenant, state the demise as ante*, 308, *&c. and then proceed as follows:*] and being so possessed thereof, he the plaintiff afterwards, and before the said time when &c., to wit, on the said —— day of ——, *put* his said cattle in the said declaration mentioned, the same then being his own commonable cattle *levant* and *couchant*, in and upon the said messuage, lands and premises, with the appurtenances of the plaintiff, into the said common or waste called ——, to depasture the grass there then growing, and to use his said common of pasture there, as it was lawful for him to do for the cause aforesaid, and the said cattle remained there, using the said common of pasture there, until the escape thereof hereinafter mentioned; and because the said fence between the said common or waste called &c. and the said close in which &c., before and at the said time when &c. was ruinous, broken down, insufficient, and in decay for want of necessary repairing and amending thereof, the said cattle of the plaintiff in the said declaration mentioned, a little before the said time when &c., to wit, on the said —— day of —— A. D. ——, aforesaid, escaped out of the said common or waste called &c. into the said close in which &c. through the said defect of the said fence, and remained therein until &c. [*Conclude as in the form, ante*, 484, *from the asterisk.*

The like, that *locus in quo* adjoins a common in which plaintiff had right of common, and that the cattle escaped through defect of fence between the common and *locus in quo*, which defendant ought to have repaired. (*f*)

Commencement of plea in bar, as ante, 473.] Because he saith that, &c. [*Here state the seisin in fee and prescriptive right of common in* locus in quo,

To avowry damage feasant, that plaintiff

(*f*) See the notes to the form, *ante*, 308, and a form, Morg. 605.

DAMAGE FEASANT.

as ante, 376; *or if by a copyholder, as ante*, 377; *and if the plaintiff be a tenant, after the seisin and prescriptive right of common state the demise and entry, as ante*, 308, *and proceed as follows:*] and the plaintiff being so possessed, he the plaintiff afterwards, and before the said time when &c. to wit, on the day and year in the said declaration mentioned, turned and put the said cattle, being his own commonable cattle, *levant* and *couchant*, in and upon the said [messuage and land] with the appurtenances, into the said close, in which &c. to feed and depasture on the grass there then growing, and to use the said common of pasture of the plaintiff there, as he lawfully might, and the said cattle remained and continued therein, feeding and depasturing on the grass there then growing, and using the said common of pasture, until the defendant of his own wrong, at the said time when &c. took the said cattle in the said place in which &c. and unjustly detained the same against sureties and pledges, until &c. in manner and form as the plaintiff hath above thereof complained against him. And this &c. [*Conclude with a verification, as ante*, 473.

had right of common in *locus in quo*. (*g*)

Tender of amends before impounding. (*h*)

Commencement of plea in bar, as ante, 473.] Because he saith, that after the taking of the said cattle in the said place in which &c. by the defendant, and before the impounding of the same, to wit, on the same day and year in the said declaration mentioned, he the plaintiff tendered and offered to pay to the defendant a certain sum of money, to wit, the sum of £——, as amends for the said damage done to the defendant by the said cattle in the said place in which &c. as aforesaid, and which was then sufficient amends for the same; which said sum of £—— the defendant then wholly refused to accept from the plaintiff, and unjustly detained the said cattle against sureties and pledges &c. until &c. in manner and form as the plaintiff hath above

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(*g*) See the forms, 2 Wils. 269; Boote's Suit at Law, 241—243; Plead. Ass. 472; 2 Rich. C. P. 340.

(*h*) See the forms of plea in bar and replication, Morg. 603; Gilb. Distress by Hunt, 286; 8 Co. 147 a; 3 Lutw. 1596; see 1 Campb. 285; 1 Taunt. 261; see plea, *ante*, 317. A tender of rent and costs of distress after impounding is too late, *Ellis* v. *Taylor*, 8 M. & W. 415; see also *Ladd* v. *Thomas*, 12 A. & E. 117; 4 P. & D. 9, S. C.; *Thomas* v. *Harris*, 1 M. & G. 695. Where cattle, distrained damage feasant, were in a private pound, and the distrainor admitted they were about to be forwarded to a public pound, it was held that a tender of amends, made while they were in the private pound, was not too late; *Browne* v. *Powell*, 4 Bing. 230. On special demurrer to a plea that after the taking, and before the impounding, the plaintiff tendered the rent and expenses, on the ground that the plea did not go to the taking, but only to the detention, it was held a good plea, the tortious detention being a taking; *Evans* v. *Elliott*, 5 A. & E. 142. At common law, the owner of cattle taken damage feasant might before impounding tender amends, *Six Carpenters' case*, 8 Co. Rep. 146 a; *Anscomb* v. *Shore*, 1 Campb. 285; 1 Taunt. 261; 6 N. & M. 610, n.; Com. Dig. Pleader (3 K. 23); and after the tender of sufficient amends, they could not be lawfully detained or impounded. The owners, however, remained liable to an action of trespass *quare clausum fregit*, in which he would have no defence. But by 29 Jac. 1, c. 16, s. 5, it is enacted, that in all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim in his plea to make any title or claim to the land in which &c., and the trespass be by negligence or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon or upon some of them the plaintiff shall be enforced to join issue; and if the issues be found for the defendant, or the plaintiff shall be nonsuited, the plaintiff shall be clearly barred from the said action and all other suits concerning the same. This statute did not extend to trespasses by mistake, if the acts were voluntary, *Baseley* v. *Clarkson*, 3 Lev. 37; or to any trespass or taking goods, *Bailee* v. *Viveash*, 1 Str. 549. In replevin it would not from the above cases appear to be necessary to plead that the trespass was involuntary. In *Allen* v. *Bayley*, 2 Lutw. 1594, however, the plea in bar to the avowry alleged that the trespass had been committed *involuntarie et contra eventem le distreinee*, *ibid.* 1595.

thereof complained against the defendant. And this &c. [*Conclude with a verification as ante, 473, seventh form.*

To avowry damage feasant by a *commoner*, denial of his right of common. (*i*)

Commencement of plea in bar, as ante, 473.] Because he saith, that the defendant and all those whose estate he now hath, and at the said time when &c. had, of and in the said messuage and land, with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have not had, nor have been used and accustomed to have, nor of right ought to have had, nor ought the defendant still of right to have, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture in, upon and throughout the said place in which &c. called ——, for all his and their commonable cattle, *levant* and *couchant*, in and upon the said messuage or land, with the appurtenances, in every year, at all times of the year, as to the said messuage or tenement and land, with the appurtenances, belonging and appertaining, in manner and form as the defendant hath above in his said avowry in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To avowry damage feasant by a commoner, plea that the plaintiff's cattle were depasturing on a part of the common in the parish of A., and that the defendant drove them to another part in another parish and county, where they unavoidably committed the damage alleged in the avowry. (*k*)

And the plaintiff, as to the avowry of the defendant, says, that the defendant ought not to avow the taking of the said cattle in the declaration mentioned, in the said close in which &c. and justly &c. because he says, that a little before the time when &c. the cattle were depasturing on a certain other part of the D. common, situate in the parish of ——, in the county of G., and that the defendant, a little before the said time when &c., whilst the cattle were so depasturing, wrongfully and without leave of the plaintiff, drove them off the last mentioned part of the common upon the said part of the common in the county of B. and parish of ——, being the place in which &c.; and when the said cattle were so driven they unavoidably destroyed the grass and did damage there, which are the same destroying &c. in the said avowry mentioned; whereupon the defendant wrongfully took the cattle in the said last mentioned part of the D. common, being the close in which &c. And this the plaintiff is ready to verify, wherefore, &c.

(*i*) See the avowry, *ante*, 308; and as to the mode of denial, see 1 Saund. 103, 1. The plaintiff may either traverse the defendant's seisin in fee, or his right of common, or may plead in bar his own right of common, as in the form, *supra*, and 308. The words of the traverse, as they depend on the avowry, necessarily vary in each particular case. It suffices to deny the right of common generally.

(*k*) See *Evans* v. *Rees*, 2 P. & D. 626; 10 A. & E. 151.

XXIV. REPLICATIONS TO PLEAS IN TRESPASS.

IN GENERAL.

1. IN GENERAL.

Commencement of a replication to a special plea in trespass.

Similiter to general issue, as ante, 422, and commencement of replication to the special plea as follows:] And the plaintiff, as to the plea of the defendant by him [secondly] above pleaded, saith, that &c. [*Here state the subject-matter of the replication.*

Conclusion with a verification.

And this the plaintiff is ready to verify.

To plea of tender, that the amends were not sufficient.(a)

Commence as ante, 422.] Because he saith, that the said sum of £— in the said plea mentioned, and therein alleged to have been tendered by the defendant to the plaintiff as aforesaid, was not sufficient amends for the said trespasses, in manner and form as the defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

To a plea of payment of money into Court, replication that the sum was insufficient amends.

See the forms, *ante*, 471.

To a plea of verdict recovered against plaintiff denying the verdict was for same cause of action.

Commence as ante, 422.] Because he saith, that the trespasses in the said declaration in this action mentioned are not the same trespasses as those in the said last plea mentioned, and for and in respect whereof the said alleged judgment in the said last plea mentioned was recovered. And this the plaintiff prays may be inquired of by the country, &c.

De injuriâ or *de son tort demesne.*(b)

Commencement as ante, 422.] Because he saith, that the defendant at the said time when &c. of his own wrong, and without the cause by him in his said [second] plea alleged, committed the said several trespasses in the intro-

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(a) See pleas, *ante*, 316, 317; and as to this replication, Com. Dig. Pleader, 3 M. 36; 1 Marsh. 220. The replication should allege either that the defendant did not tender the sum named, or that the sum was insufficient, and not that he did not tender sufficient amends, which would put in issue as well the fact of tender as the sufficiency of the sum tendered. See *Williams* v. *Price*, 3 Bar. & Ad. 695, as to the form of replication.

(b) See the form, 1 Rich. C. P. 150. When this replication is proper, see Com. Dig. Pleader, F. 18, &c.; 1 B. & P. 76; 2 Bla. Rep. 1165; 11 East, 70, 451; 2 Campb. 629; and *ante*, vol. i. Index, "*De Injuriâ.*" A replication *de injuriâ*, where it ought not to be used, is cured by verdict, Hob. 76; Sir T. Raym. 50; but is bad on general demurrer, 3 Lev. 65. In an action of assault and battery, *de injuriâ* is a good replication to a plea stating that A. B. was possessed of a close, and that the plaintiff was making a noise, &c., *and that defendant as servant of A. B. and by his command*, &c. turned plain-

ductory part of that plea mentioned, in manner and form as the plaintiff hath above in his said declaration complained against the defendant. And this the plaintiff prays may be inquired of by the country, &c. IN GENERAL.

2. To Persons.

TO PERSONS.

De injuriâ, to *son assault demesne*. (*c*)

Commencement as ante, 422.] Because he saith, that the defendant at the said time when &c. of his own wrong, and without the cause by him in his said [second] plea alleged, committed the said several trespasses in the said plea attempted to be justified, in manner and form as the plaintiff hath above in his said declaration complained against the defendant. And this the plaintiff prays may be inquired of by the country, &c.

To plea of *son assault demesne*, that E. F. was possessed of a house, and that plaintiff, as his servant, made the supposed assault to turn defendant out. (*d*)

Commencement as ante, 422.] Saith, that long before and at the said time when &c. in the said [first] count mentioned, one E. F. was lawfully possessed of a certain [dwelling-house] with the appurtenances, situate and being in the [parish] aforesaid, and being so possessed thereof, the defendant, just before the said time when &c. in the said [first] count mentioned, was wrongfully and unjustly in the said [dwelling-house] making a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance, without the license or consent, and against the will of the said E. F. for a long space of time, to wit, until and at the said time when &c. in the said [first] count mentioned, and thereby then greatly disturbed and disquieted the said E. F. and his family in the peaceable and quiet possession, use and enjoyment of the said [dwelling-house]. Whereupon the plaintiff, at the said time when &c. in the said [first] count mentioned, as the servant of the said E. F. and by his command, requested the defendant to cease his said noise and disturbance, and to go and depart from and out of the said [dwelling-house], which the defendant then refused to do; whereupon the plaintiff, as such servant of the said E. F., and by his command, gently laid his hands upon the defendant in order to remove the defendant from and out of the said [dwelling-house], as he lawfully might for the cause aforesaid, and which said laying of hands by the plaintiff on the defendant in manner and for the cause aforesaid was the said alleged

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tiff off, and *command* may now be traversed under *de injuriâ*, *Piggott* v. *Kemp*, 1 Crom. & Mees. 197; *Selby* v. *Bardons*, 3 B. & Adol. 19, S. P.; and see *Wisdom* v. *Houston*, 3 Tyr. R. 811; *Reece* v. *Taylor*, 1 Har. & Wol. 15, 16, where Littledale, J. said it is not necessary to *reply* or *new assign*, except to a plea of *son assault demesne*.

(*c*) See the pleas, *ante*, 318, &c.; and as to this replication in general, see Com. Dig. Pleader, 3 M. 16, and F. 18, &c.; Skin. 387; see forms, 1 Rich. C. P. 150; 2 Rich. C. P. 57; Plead. A. 447. The replication may in general be *de injuriâ*, as in the above form; but when in fact the plaintiff made the first assault in defence of his possession, &c., or whenever, in answer to the defendant's plea of *son assault*, he relies upon *new* matter, he should not reply generally *de injuriâ*, but should state such new matter, as in the following forms, according to the facts, and in Carth. 280; and 2 Bla. Rep. 1165; *ante*, vol. i. Index, "*De Injuriâ*." The motive and intention with which a defendant turned the plaintiff out of a house, being the assault complained of, cannot be inquired into on the traverse *de injuriâ*; *Oakes* v. *Wood*, 2 M. & W. 791.

(*d*) The general replication *de injuriâ* would in this case be improper, as the assault pleaded by the defendant is not here denied, but confessed and avoided. See a case precisely similar in Carth. 280; and 2 Bla. Rep. 1165; Skin. 387; and the note to the preceding form. As to stating the defence of possession, see *ante*, 323.

To PERSONS.

assault by the defendant in his said [second] plea mentioned to have been committed by the plaintiff, and thereupon the defendant being thereby then greatly irritated and enraged, at the said time when &c. of his own wrong committed the said trespasses in the introductory part of the [second] plea mentioned, in manner and form as the plaintiff hath above thereof complained against the defendant. And this the plaintiff is ready to verify. [And the plaintiff is also ready to verify, that he did not assault the defendant as in the [second] plea mentioned elsewhere than in the said [dwelling-house] of the said E. F.], wherefore he prays judgment and his damages by him sustained, on occasion of the committing of the said trespasses in the introductory part of the said [second] plea mentioned, to be adjudged to him &c.

To plea of defence of possession of close, that plaintiff had right of way over the close.

Commencement as ante, 422.] Saith, that the plaintiff, long before and at the said time when &c. in the declaration mentioned, was and still is seised in his demesne as of fee of and in a certain close, with the appurtenances, situate and being contiguous and next adjoining to the said close of the defendant in the said [second] plea mentioned, and that the plaintiff and all &c. [*Here state the prescriptive or other right of way, as ante, &c. and then proceed as follows:*] wherefore the plaintiff afterwards, and at the said time when &c. in the declaration mentioned, was about to put his said cattle into the said close of the plaintiff in the said [second] plea mentioned, to depasture the grass then there growing, and then endeavoured to open the said gate in the said plea mentioned, in order to lead his said cattle from and out of the said queen's public highway, in and along the said way in the said close of the defendant unto and into the said close of the plaintiff as it was lawful for him to do for the cause aforesaid; and thereupon the defendant at the said time when &c. of his own wrong committed the said several trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the plaintiff hath above in his said declaration alleged. And this the plaintiff is ready to verify, &c.

To justification under a capias and warrant, admitting the issuing of the writ and warrant, and *de injuriâ* as to the residue of the plea. (*e*)

Similiter to the general issue, as ante, 422. *To second plea commencement, as ante*, 422.] Because, [admitting that the said writ of our said lady the queen, called a capias, was issued out of the said Court of our said lady the queen, before the queen herself, directed to the said sheriff of ——, or delivered to the said sheriff to be executed, and that such warrant was thereupon made by the said sheriff, or delivered to the defendant in manner and form as he hath above in his said [second] plea in that behalf alleged;

(*e*) Where process or a warrant is stated in the plea, the plaintiff cannot reply *de injuriâ* generally, but must either traverse the issuing of the writ or the warrant, or that the trespasses were committed in due execution thereof showing why, Com. Dig. Pleader, F. 18, 19, 20, &c.; 1 B. & P. 76; 16 East, 82; and sometimes without showing why, 2 Young & Jer. 304; and *ante*, vol. i. Index, "*De Injuriâ.*" Where the defendants, in trespass for entering the plaintiff's house and taking his goods, justified under a writ of *fi. fa.* and warrant thereon, a replication admitting the issue of the writ and warrant, and concluding with *de injuriâ absque residuo causæ*, does not admit the seizure under them; *Carnaby* v. *Welby*, 8 A. & E. 872; 1 P. & D. 98, S. C. In an action against the sheriff for false imprisonment, to plea of justification under writ of *ca. sa.* see replication that after the delivery of the writ, and before execution, the plaintiff in the original action released the defendant and forbad the sheriff to execute the writ; *Barker* v. *St. Quintin*, 1 D. & L. 642.

for replication nevertheless in this behalf,] the plaintiff saith, that the defendant at the said time when &c. in the said declaration mentioned, of his own wrong, and without the residue of the cause in his said [second] plea alleged, (*f*) [made the said assault in the said declaration mentioned upon the plaintiff, and pushed, forced and thrust the plaintiff from and out of the said messuage or dwelling-house in the said declaration mentioned, into the said street therein also mentioned, and while the plaintiff continued on the ground in the said street, pulled, hauled and dragged him upon his back through the mud and dirt in and along the said street, and for the distance and length of way in the said declaration also mentioned, and thereby hurt, bruised and wounded the plaintiff and imprisoned him the plaintiff, and kept and detained him in prison for the said space of time in the declaration mentioned; and also at the said time when &c. rent, tore, damaged and spoiled the clothes and wearing apparel of the plaintiff in the declaration mentioned,] in manner and form as the plaintiff hath in and by his said declaration above complained against the defendant. And this the plaintiff prays may be inquired of by the country, &c.

To a plea by sheriff justifying imprisonment of plaintiff under a writ of detainer, that there was no affidavit of debt to warrant such detainer. (*g*)

And the plaintiff, as to the plea of the defendant by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith, that at the time of the said sheriff detaining the plaintiff for the cause aforesaid as in the said plea alleged, there was no affidavit of the defendant's cause of action in that plea alleged made before any judge or commissioner of the said Court of our lady the queen, before the queen herself, authorised to take affidavits in the said Court, or before the officer who issued the said writ, or his deputy, according to the form of the statute in that case made and provided, nor was there any order, rule or authority of or from the said Court, or of or from any one or more of the judges thereof, or of the judges of the Court of our lady the queen of the Bench, or of the barons of our lady the queen's Exchequer at Westminster, authorising or empowering the defendant, or the said sheriff, or any other officer or person, to make the said detainer. And this the plaintiff is ready to verify, &c.

Replication to a plea justifying under a writ of capias a battery and bruising, &c. because plaintiff attempted a rescue, that defendant beat plaintiff more than was necessary. (*h*)

Commencement as ante, 422.] Saith, that the defendants at the said time when &c. in the said declaration mentioned, of their own wrong committed the said trespasses in the introductory part of that plea mentioned to a greater degree and with more force and violence than was necessary for the purpose in that plea mentioned, in manner and form as the plaintiff hath above complained against the defendants. And this the plaintiffs are ready to verify, &c.

Replication to plea of *son*

Saith, that the defendant at the said time when &c. assaulted &c. [*repeat-*

(*f*) Or instead of the long repetition between the brackets, say, "*committed the said trespasses in the introductory part of the said plea mentioned.*"

(*g*) See the form in *Younge* v. *Beck*, 1 Crom. M. & Ros. 450. This form will now be inapplicable.

(*h*) As to the necessity of replying specially, see 7 Moore, 33; 2 Campb. 176; 3 Wils. 20; 5 B. & Ald. 220; *ante*, vol. i. Index, "*Trespass.*" As to what evidence allowed under, see 1 Stark. 56.

To Persons

assault demesne, that defendant's battery, &c. *was excessive.*

ing the trespasses,] with more force and violence, and to a greater degree and extent, and gave and struck the plaintiff a great many more and more severe blows and strokes, and cast and threw the said chair at her as in the said declaration mentioned with more force and violence than was or were necessary for the purpose and on the occasion in the said second plea mentioned. And this the plaintiff is ready to verify, &c.

Replication to a plea justifying seizure of pigs *damage feasant* in a close in possession of A. B., that he was not possessed of such close.

See form of replication and law, *Bond* v. *Downton*, 2 Adol. & El. 26.

Replication to a plea justifying assault in defence of seizure of horses *damage feasant*, that the horses at the time of seizure were being used by the plaintiff. (*i*)

And the plaintiff, as to the plea of the defendants by them [secondly] above pleaded to the [first] count of the declaration, says, that one of the said horses, and one of the said sets of harness, in the said plea mentioned, were at the time of the seizing thereof as a distress, as in that plea mentioned, a horse and set of harness of the plaintiff, and were then in the actual possession of the plaintiff and then under his personal care, and were then being actually used by the plaintiff, and that the other of the said horses and the other set of harness, in that plea mentioned, were at the time of the seizing thereof as a distress, in that plea mentioned, a horse and set of harness of one E. F. and were then in the actual possession of the said E. F. and under his personal care, and were then being used by the said E. F., wherefore the plaintiff in his own right and as the servant and by the command of the said E. F., did interfere with and interrupt the said defendant G. A. and the two other defendants in proceeding with the said distress, and stayed and continued interfering with and interrupting them as in that plea mentioned, as it was lawful for him to do for the cause aforesaid. And this the plaintiff is ready to verify, &c.

To Personal Property.

3. To Personal Property.

To a plea of distress damage feasant, that R. F. was seised of *locus in quo*, and demised same to plaintiff, wherefore defendant of his own wrong, &c. (*k*)

Commencement as ante, 422.] That before the said times when &c. and at the time of making the demise hereinafter next mentioned, and from thence hitherto, one E. F. was and still is seised in his demesne as of [freehold for the term of his natural life,] of and in the said outhouse in which &c. in the said [second] plea mentioned, and being so seised, long before the said time when &c. to wit, on the —— day of ——, A. D. ——, the said E. F. demised the said [out-house] in which &c. in the said [second] plea mentioned, amongst other things to the plaintiff, to have and to hold the same to the plaintiff from thenceforth for one whole year then next following, and so on from year to year so long as they the said E. F. and the plaintiff should respectively please. By virtue of which said demise, the plaintiff afterwards and before the said time when &c. to wit, on the —— day of ——, A. D. ——, aforesaid, entered into the said [out-house] in the

(*i*) See *Field* v. *Adams*, 12 A. & E. 649; 4 P. & D. 504, S. C.

(*k*) The replication *de injuriâ* is in general sufficient, except where the plaintiff and defendant are tenants in common, or when defendant justifies as servant, and this replication may often be useful, in order to narrow the evidence to be adduced upon the trial; 1 East, 212.

said [second] plea mentioned, in which &c. with the appurtenances, and became and was thereof possessed, and being so possessed, and the said E. F. being still living, the plaintiff continued so possessed of the said [out-house] in the said [second] plea mentioned, under and by virtue of the said demise, from thence until the defendant, during the continuance of the said tenancy, to wit, at the said time when &c. of his own wrong, broke and entered the said said [out-house] in which &c. in the said second plea mentioned, and the defendant unlawfully became possessed thereof, and the defendant unlawfully committed the said trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the plaintiff hath above thereof complained against the defendant. And this the plaintiff is ready to verify, &c.

See *Carrington* v. *Roots*, 2 M. & W. 248.

Replication to plea of damage feasant, that the defendant had sold to the plaintiff the crop of grass on the *locus in quo*, with leave to enter, cut and remove the grass. (*l*)

Commencement as ante, 422.] Saith, that one E F. long before the said time when &c. was seised in his demesne as of fee of and in divers, to wit, —— acres of land, with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, and that the said E. F. and all those whose estate he now hath &c. [*here state the prescriptive right of common and demise to the plaintiff, and his putting on his commonable cattle, as in pleas in bar in trespass, ante*, 376,] and the said cattle, at the said time when &c. remained and continued feeding and depasturing in the said close in which &c. and using the said common of pasture there until the defendant at the said time when &c. of his own wrong, committed the said trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the plaintiff hath above thereof complained against the defendant. And this the plaintiff is ready to verify, &c.

To a plea of distress damage feasant, that plaintiff had right of common in *locus in quo*. (*m*)

Commencement as ante, 422.] Saith, that the said close in the said [second] plea mentioned, before and at the said time when &c. did lie and still doth lie contiguous and next adjoining to a certain common and public queen's highway in the parish aforesaid, and that the defendant and all other the tenants and occupiers of the said close in which &c. with the appurtenances, for the time being [*here state the obligation to repair, and the defect of the fences, and that the plaintiff's cattle being driven* (*o*) *along the way thereby escaped into the close as ante*, 365, *and then proceed as follows*:] and remained and continued in the said close in which &c. until the defendant at the said time when &c. and before the plaintiff could drive the said cattle from and out of the said close in which &c. of his own wrong, seized, took and drove away the said cattle and impounded the same, and kept and detained the same so impounded for the said space of time in the said declaration mentioned. And this the plaintiff is ready to verify, &c.

To a plea of distress damage feasant, defect of fences. (*n*)

(*l*) The contract replied here must be in writing, for it is in substance an action charging the defendant on the contract within s. 4 of the Statute of Frauds; but although a contract for the sale of an interest in land without a note in writing cannot be made available in any way as a *contract*, it may operate as a license so as to excuse the entry of the purchaser on the land; *Carrington* v. *Roots*, 2 M. & W. 248.

(*m*) See the replication, 1 Saund. 222.

(*n*) See a form, Morg. 639.

(*o*) 2 Hen. Bla. 527; Dyer, 365.

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To plea in trespass for driving the plaintiff's sheep and leaving them on a highway, that they were wrongfully in defendant's close depasturing, another replication of defect of fences. (*p*)

And the plaintiff, as to the plea of the defendant by him above pleaded to the [second] count of the declaration, says, that the plaintiff heretofore, to wit, at the said times when &c. was and still is possessed of a certain close, situate and being in the said parish of ——, and contiguous and next adjoining to the said close of the defendant G. H., and the defendant G. H. and all other the tenants and occupiers of the said close in which &c. for the time being, frome time whereof &c. have repaired and of right ought to repair the hedges and fences between the said close of the defendant G. H. and the said close of the plaintiff as often as need hath been or required, in order that cattle being feeding and depasturing in those closes respectively might not err or escape out of the one into the other of them through the defects of the said hedges and fences; and because the said hedges and fences between the said closes of the defendant G. H. and the plaintiff, before and at the said time when &c. were ruinous and in decay for want of needful and necessary repair thereof, the said sheep being feeding and depasturing in the said close of the plaintiff, a little before the said time when &c. erred and escaped from and out of the plaintiff's said close into the said close of the defendant G. H., in which &c. through the defects of the said hedges and fences between those closes, and on that occasion were in the said close of the defendant G. H. in which &c. until the defendants at the same time when &c. of their own wrong, chased and drove about the said sheep from and off the said closes in the [second] count of the declaration mentioned, into the said highway in the said declaration also mentioned, when and where the defendants left the said last mentioned sheep in manner and form as the plaintiff has above thereof complained against them. And this the plaintiff is ready to verify, &c.

To a plea of distress damage feasant, that defendant converted distress to his own use. (*q*)

Commencement as ante, 422.] Saith, that after the taking and impounding the said cattle in the said declaration mentioned by the defendant in the name of a distress, in manner and form as the defendant hath in his said [second] plea in that behalf above alleged, to wit, on &c. aforesaid, the defendant converted and disposed of the said cattle to his own use, in manner and form as the plaintiff hath above thereof complained against the defendant. And this the plaintiff is ready to verify, &c.

To same plea, replication that the distress was in use by the plaintiff. (*r*)

And the plaintiff, as to the plea of the defendant by him above pleaded to the [second] count of the declaration, says, that the said cattle, goods and chattels in that count mentioned, at the said time when &c. were in the actual possession of the plaintiff and under his personal care, and were then being actually used by him. And this the plaintiff is ready to verify, &c.

Declaration in trespass for cutting down ropes, &c. *plea*, that defendant was possessed of close, and because ropes, &c. wrongfully erected, defendant removed them; *replication*, that plaintiff, as tenant of a messuage had a right to hang lines and dry linen, &c.

See *Drewell* v. *Towler*, 3 Bar. & Adol. 735.

(*p*) See *Carruthers* v. *Hollis*, 8 A. & E. 113; 3 N. & P. 246, S. C.

(*q*) See the form, 3 Wils. 20; and see 4 T. R. 364; 1 Stark. C. N. P. 173.

(*r*) See Vin. Ab. tit. Distress (A), Damage Feasant. In trespass for taking a dog, to a plea of damage feasant the plaintiff cannot reply that the dog was being used; *Bunch* v. *Kennington*, 4 P. & D. 509.

Replication to a plea of justification under a writ of *fieri facias*, that a writ of error was allowed before the levy under the execution. (*s*)

First plea, special similiter to a plea of general issue; second plea as follows:] And as to the plea of the defendant by him [secondly] above pleaded as to the several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, the plaintiff says, that after the recovery of the said judgment which the same writ of *fieri facias* was founded upon and issued, and before the issuing of the said writ of *fieri facias* in the said [second] plea mentioned, and the levying of execution as aforesaid, to wit, on &c. a certain writ of error of our said lady the queen was duly issued out of Chancery, directed &c. commanding him &c. [*here set out the writ of error in the past tense*] as by the said writ of error now remaining with the proper officer of the Court of our said lady the queen, before the queen herself in that behalf, not yet returned by the said officer, more fully appears; which said writ of error afterwards and before the said time when &c. to wit, on &c. was duly allowed, according to the course and practice of the said Court, and at the said time when &c. was in full force and effect, and was a supersedeas to the said writ of *fieri facias* upon the said judgment, and wholly superseded the execution of the said writ of *fieri facias*; and that afterwards and before the said time when &c. to wit, on &c. the plaintiff duly gave notice to the defendant and to the other defendants of the said writ of error and of the said allowance thereof, and then duly required the defendant and the said other defendants to cease to execute the said writ of *fieri facias*, but that the defendant and the other defendants then wholly neglected and refused to comply with the said request; and after they so had notice of the said writ of error, and the said allowance thereof as aforesaid, committed the said several trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the plaintiff has above thereof complained against him. And this the plaintiff is ready to verify, &c.

Replication to same plea that by a rule of Court it was ordered that the writ should be set aside. (*t*)

And the plaintiff, as to the plea of the defendant by him [secondly] above pleaded, says, that after the suing and prosecuting out of the said Court of the said writ of *fieri facias*, by a rule of the said Court then duly made and intituled in the said cause, and also intituled &c. it was ordered by the said Court that the said writ of *fieri facias* and all subsequent proceedings should be set aside for irregularity with costs; and it was referred to one of the masters to tax such costs, which costs when taxed should be paid by the defendant to the plaintiff or his attorney, as by the said last mentioned rule of the said Court of our lady the queen, before the queen herself, reference being thereunto had, will fully appear. And this the plaintiff is ready to verify, &c.

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To *liberum tenementum*, denial of plea. (*u*)

And the plaintiff, as to the plea of the defendant by him —— above pleaded, saith, that the said [close] in the said declaration mentioned, in

(*s*) And see a form, *Belshaw* v. *Marshall and others*, 4 B. & Adol. 336; 1 N. & M. 689, S. C.; see *Doe* v. *Wright*, 2 P. & D. 672.

(*t*) See *Jones* v. *Williams*, 8 M. & W. 351; and *Codrington* v. *Lloyd*, 8 A. & E. 449.

(*u*) If the plaintiff has been in possession twenty years adversely, this is a good replica-

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which &c. now is, and at the said several times when &c. was [the close, soil and freehold of the plaintiff, (*x*) and] not the close, soil and freehold of the defendant, in manner and form as the defendant hath above in his said [second] plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

To *liberum tenementum*, demise by defendant to plaintiff. (*y*)

Commencement as in last form.] Saith, that whilst the said [dwelling-house] was the [dwelling-house] and freehold of the defendant, and before the said time when &c., to wit, on &c. [*day of demise*] the defendant demised the said [dwelling-house] with the appurtenances to the plaintiff, to have and to hold the same to the plaintiff, for and during and unto the full end and term of one year from thence next ensuing, and fully to be complete and ended, and so on from year to year, for so long time as they the plaintiff and defendant should respectively please [*or if the demise be under an indenture of lease, then set forth the lease and habendum as ante*, vol. ii. 391], by virtue of which said demise the plaintiff afterwards, and before the said time when &c. entered into the said [dwelling-house] and became and was possessed thereof, and continued so thereof possessed, from thence until the defendant afterwards, and during the continuance of the said demise, to wit, at the said time when &c. of his own wrong, broke and entered the said [dwelling-house] and committed the said several trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the plaintiff hath above thereof complained against the defendant. And this the plaintiff is ready to verify, &c.

The like pleaded by way of estoppel.

See *Darlington* v. *Pritchard*, 4 M. & G. 785.

To plea of *liberum tenementum* in trespass for mesne profits, replication by way of estoppel of recovery in ejectment. (*z*)

See *Doe* v. *Wright*, 10 A. & E. 763; 2 P. & D. 672, S. C.

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tion; 2 Taunt. 157. When the name of the close, or the abuttals thereof, have been set forth in the declaration with such certainty as to preclude the possibility of the defendant's having another close of the same name or abuttals in the same parish, the above replication will suffice. This replication must conclude to the country; 2 Lutw. 1401; Com. Dig. Pleader, 3 M. 34; 11 East, 70, 71; and *id.* n. (*a*). If the plaintiff claim as tenant, &c. under the defendant, the replication must be special, as in the following form. When the close is not set forth with name or abuttals, and there is any reason to apprehend that the defendant may be able to prove that he was seised of any close in the same parish, it is necessary to *new assign*, setting out the name and abuttals as in the form *post*. See 1 Saund. 299 b, c; but not so if the close be named in the declaration, 2 D. & R. 719; 1 B. & C. 489, S. C.; *ante*, vol. i. Index, "*Liberum Tenementum*."

(*x*) This allegation is not necessary; it is sufficient to traverse the close being the defendant's; and where, in fact, the *locus in quo* was not the plaintiff's freehold, this allegation should be omitted. *Sed quære*, Com. Dig. Pleader, 3 M. 34.

(*y*) Replication of demise by defendant to plaintiff of copyhold property, *Brown* v. *Storey*, 1 M. & G. 118; of demise by agent of defendant, *Wilkins* v. *Boutcher*, 3 M. & G. 807. To this replication the defendant may traverse a demise by the *defendant*; *id. ibid.* In trespass for assaulting and imprisoning of plaintiff, the defendants pleaded that plaintiff was trespassing on defendants' close. The plaintiff replied, that the defendants had nothing in the close, except under R. N. C.; that before the time when &c. and before the defendants had any thing in the close, R. N. C. demised it from year to year to W. C.; that W. C. permitted plaintiff to plant a crop of teazles, on condition that W. C. should have one half of the crop and plaintiff the other; and that plaintiff entered to cut his teazles when defendants assaulted him. It was held, that the replication was a sufficient answer to the plea, although it did not allege that W. C.'s interest in the land was continuing when plaintiff entered to cut the teazles; 4 Bing. 202, and see the form of replication there.

(*z*) The defendant cannot rejoin that a writ of error was pending on the judgment; *Doe* v. *Wright*, 2 P. & D. 672.

Commence as ante, 422.] Saith, that the defendant, at the same time when &c., of his own wrong, and without the leave or license of the plaintiff to the defendant first given and granted in that behalf, committed the said several trespasses in the introductory part of the said second plea mentioned, in manner and form as the plaintiff hath above thereof complained against him the defendant. And this the plaintiff prays may be inquired of by the country, &c.

To a plea of license, denial of license. (*a*)

Commence as ante, 422.] Saith, that before the said time when &c. in the declaration mentioned, to wit, on &c., the said alleged license was revoked, recalled and countermanded by the plaintiff. And this the plaintiff is ready to verify, &c.

Replication to a plea of license, a countermand. (*b*)

That the said alleged liberty, license and authority were granted, subject to a condition, that if J. B. his executor &c. should at any time or times neglect effectually to work the said premises by the said alleged indenture granted for any time or times exceeding in the whole six calendar months in any one year of the said term, or should not work effectually such mine or mines, and the veins and lodes discovered or to be discovered within the said premises, unless hindered by unavoidable accident, or should fail in the performance of all or either of the covenants, &c. in the said alleged indenture contained, then and from thenceforth that the said alleged indenture, and the liberties, licenses, powers and authorities thereby granted, and every of them, should cease, determine and be utterly void and of no effect to all intents and purposes. And the plaintiff further saith, that the said J. B. in his lifetime, and the executrix afterwards, for a space of time exceeding in the whole six calendar months &c. neglected effectually to work the said premises by the said alleged indenture granted, he the said J. B. not having been during the said time hindered by unavoidable accident, contrary to the condition of the said indenture and true intent and meaning thereof, whereby the said alleged indenture, and the said alleged liberty, license and authority long before the committing of the trespasses mentioned in the plea, to wit, on the 8th December, 1822, ceased, determined and became and were utterly void and of no effect.

Replication to a plea of license by deed, by a prior owner of *locus in quo*, that it was granted subject to a *condition*, which was not performed, whereby license ceased and determined. (*c*)

And as to the plea of the defendant by him [secondly] above pleaded the plaintiff says, that the defendant entered upon the said close in which &c. and committed the trespasses as in the plea above acknowledged, after the passing of a certain act of parliament made and passed in a session of parliament holden in the third and fourth years of the reign of his late majesty King William the Fourth, intituled "An Act for the Limitation of Actions

To plea of title and entry under it, replication that the defendant's entry was after the passing of 3 & 4 Will. 4, c. 27, and that the right did not first accrue to the defendant at any time within twenty years before the entry. (*d*)

(*a*) See forms, 9 Wentw. 24; Plead. A. 491. No new assignment seems necessary, 11 East, 451; 2 Cro. 87; Com. Dig. Plead. R. 5. When a new assignment is advisable, 3 Campb. 515. See a replication of excess, *id.*; *ante*, 492.

(*b*) See the notes to the above form. And see *Wallis* v. *Harrison*, 4 M. & W. 538. *Quære*, if the last form would not suffice; 11 East, 451.

(*c*) See *Roberts* v. *Davey*, 4 Bar. & Adol. 664.

(*d*) See plea, *Holmes* v. *Newlands*, 11 A. & E. 44; 3 P. & D. 128, S. C. In that case it was held, as the dates were under a videlicet, and not in their nature material, that the replication was not contradictory, on the ground that it admitted W. H.'s right of entry to have accrued since 1820, and denied it to have accrued within twenty years (the action being brought in 1839); see "*Rejoinder*," *post*.

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and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," and also after the 31st day of December, 1833, in the said act of parliament mentioned, to wit, at the said time when &c. in the declaration mentioned; and the plaintiff further says, that such entry was so made in manner aforesaid for the purpose of recovering the said close in which &c. and the said W. H. by the defendant his servant in that behalf, by means of the premises in the said declaration mentioned, did then enter upon and obtain possession of the said close in which &c. as in the declaration also alleged and as in the plea also mentioned; and the plaintiff further says, that the supposed right to make such entry as aforesaid did not first accrue to the said W. H. or to the defendant as his servant, or to any person through whom the said W. H. or the defendant claims the estate and interest in the said close in which &c. within the true intent and meaning of the said act of parliament at any time within twenty years next before the making of such entry as aforesaid; and that by reason thereof, and of the said period of twenty years next before the making of such entry having fully expired and determined before the making of the same, without such right of entry having first accrued as aforesaid at any time during the said last mentioned period, the said supposed right of the said W. H., and of the defendant as such servant as aforesaid, to make such entry, had been and was extinguished according to the force, form and effect of the said act of parliament, and the true intent and meaning thereof, before and at the said time when &c. in the declaration mentioned. And this the plaintiff is ready to verify, &c.

Replication to plea of enjoyment of right of way over the *locus in quo* by the occupiers of B. for twenty years, that the right of way was enjoyed at the commencement of the twenty years, under an act of parliament, but that the right under the act was determined by a subsequent act, but that the occupiers of B. continued to use it, which was the use mentioned in the plea.

See *Kinloch* v. *Nevile*, 6 M. & W. 795.

To a plea of escape through defect of fences, that defendant turned the cattle into *locus in quo*. (*e*)

Commence as ante, 422.] Saith, that just before the said time when &c. the said cattle in the said declaration mentioned were wrongfully turned and driven by the defendant from and out of the said highway into and upon the said close, or piece or parcel of land, in which &c. and upon that occasion, and by means and in consequence thereof, the said cattle were, at the said first time when &c. in the said close in which &c. depasturing on the grass there then growing, and doing damage there, in manner and form as the plaintiff hath above thereof complained against the defendant. And this, &c. And this the plaintiff is ready to verify, &c.

To a plea of escape through defect of fences, that defendant's cattle were unruly, &c.

Commence as ante, 422.] Saith, that the said banks, mounds and fences, between the said closes of the defendant and the said close or piece or parcel of land of the plaintiff, before and at the said several times when &c. in the said plea of the defendant and in the said declaration above respectively mentioned, were (*f*) well and sufficiently maintained and repaired to prevent cattle feeding and being in the said close of the defendant from escaping from and out of the same into the said closes of the

(*e*) *Quære* the necessity for a traverse; see the next form.

(*f*) Or, instead of this allegation, say, "were in good and sufficient repair to prevent cattle from escaping from the said common or waste into the said close called, &c."

plaintiff, and that the said cattle of the defendant, in the said second plea mentioned, at the said several times when &c. were wild, ungovernable and unruly, and used to break down banks, mounds and fences in good repair, and that the said cattle of the defendant, at the said several times when &c. through their said wild, ungovernable and unruly disposition, broke down the said mounds, banks and fences between the said close of the plaintiff and the said close of the defendant, the same then being well and sufficiently maintained and in good repair as aforesaid, and through the breach of the said banks, mounds and fences so made by the said cattle of the defendant as aforesaid, the said cattle, at the said several times when &c. entered into the said close of the plaintiff, and eat up the grass and herbage of the plaintiff then growing there, and did damage there, in manner and form as the defendant hath above in his [second] plea in that behalf alleged; [without this, that the said cattle so being in the said close, or piece or parcel of land of the plaintiff as aforesaid, a little before the said several times when &c. in the said [second] plea mentioned, and against the will of the defendant, and without his knowledge or consent, escaped from the said close or piece or parcel of land of the defendant, through the defects and insufficiency of the said banks, mounds and fences, between the said close of the defendant and the said close or piece or parcel of land of the plaintiff, as the defendant hath above in his said second plea in that behalf alleged.] And this the plaintiff prays may be inquired of by the country &c. (*g*)

Traverse. (*g*)

Commence as ante, 422.] Saith, that the defendant, and all those whose

To plea of prescriptive right of common, denial of the right. (*h*)

(*g*) *Quære* as to this traverse. If not inserted the replication should conclude with a verification.

(*h*) It was very usual in practice to reply specially *de injuriâ*, and to conclude *with a formal traverse* of right of common, way, &c. and with a *verification*, in which case a rejoinder, re-asserting the right of common, &c. was necessary, which occasioned unnecessary expense and delay, for the replication *ought* directly to deny the right of common, and *conclude to the country;* 1 Saund. 103 b, n. 3; 1 Lord Raym. 641; 7 B. & C. 846. If occasion require it, plaintiff may also, in addition to a replication, denying the right of common, new assign that the defendant entered for other purposes than those mentioned in the plea, if there be any occasion for such new assignment; see 7 B. & C. 346.

Under a similar traverse of a plea of right of way, it was held that the plaintiff was at liberty to show the character and description of the user of the way during any part of the time; as, that it was used by stealth, or in the absence of the occupier of the close and without his knowledge, or that it was merely a precarious enjoyment by leave and license, or any other circumstances which negative that it was a user or enjoyment under a claim of right; the language of the 5th section of the 2 & 3 W. 4, c. 71, which enacts "that if the other party intends to rely on any cause or matter of fact or of law *not inconsistent with the simple fact of enjoyment*, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation," being referable to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised "as of right;" *Beasley* v. *Clarke*, 5 Dowl. 50; and unity of possession need not be specially replied, *Onley* v. *Gardiner*, 4 M. & W. 496. See note (*k*) in next page.

In trespass, for breaking and entering the plaintiff's close, and treading down the grass, &c. and breaking and destroying the hedges and fences of the plaintiff, &c. the defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C. and that a certain messuage and four acres of land, was parcel and a customary tenement of that manor, and that there is, and from time whereof &c. there hath been a custom within the said manor, that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close; that J. J. being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which &c. and put his cattle in, and because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff, in his replication, took issue upon the custom; and new assigned that the defendant entered for other purposes than those mentioned in the plea; held, that upon the issue joined upon the replication the plaintiff was at liberty prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the *locus in quo* under such custom, that it was not necessary that that custom should be specially replied; 7 B. & C. 346.

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estate he now hath, and at the said several times when &c. had, of and in the said messuage and land, with the appurtenances for the time being, for thirty years next before the said time when &c. [*or* " before the commencement of this suit,"] have not actually had, used and enjoyed as of right and without interruption, nor have they been accustomed to have and enjoy as of right and without interruption, nor ought the defendant still of right to have, for himself and themselves, his and their tenants (*i*) and farmers, occupiers of the said messuage and land with the appurtenances, *common of pasture, in, upon and throughout the said close, in which &c. for all his and their commonable cattle, levant and couchant, in and upon the said messuage and land with the appurtenances, in every year and at all times of the year*, as to the said messuage and land with the appurtenances belonging and appertaining, in manner and form as the defendant hath above in his said [second] plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, &c.

To plea of a prescriptive profit *à prendre* under 2 & 3 W. 4, c. 71, denial of the enjoyment as of right. (*k*)

And as to the plea of the defendant by him [secondly] above pleaded, the plaintiff says, that for the full period of [thirty] years next before the commencement of this suit, the defendant and the said occupiers for the time being &c. with the appurtenances, or any or either of them, did not have or enjoy as of right and without interruption a right to dig, take and carry away, in, out of, or from the said close in which &c. [*state the right as set out in the plea*], in manner and form as the defendant has in the said [second] plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

To same plea of prescriptive right for thirty years, replication that a life estate existed during part of the thirty years. (*l*)

See *Clayton* v. *Corby*, 2 Q. B. Rep. 812; 2 G. & D. 174, S. C.

To plea of right of common, approvement of common. (*m*)

See the forms, Rast. Ent. 626 b; 9 Wentw. 205; Thomp. Ent. 453; Willes, 57; 3 T. R. 445; and of a custom to inclose lands in a common field, and that after such inclosure the *locus in quo* is not commonable, see 2 Wils. 270. Plea of inclosure for twenty years, 2 Taunt. 159. See form of replication, that *locus in quo* had been inclosed from common thirty years, 2 B. & C. 918; 4 D. & R. 572, S. C.

Replication to a plea of prescriptive right of common, an inclosure for upwards of twenty years.

See the form in *Tapley* v. *Wainright*, 5 Bar. & Adol. 395.

Observations on traverses of rights of common and ways in general.

From the note to the above form, and especially from the case in 7 B. & C. 346, it will appear, that where the right of common or way, as stated by the defendant, is denied by the plaintiff, it is in general sufficient merely to

(*i*) See the case in 7 B. & C. 346. The language of the traverse will of course depend on the language of the plea.

(*k*) On this traverse of the plea, the plaintiff may show unity of possession during part of the time, which will defeat the plea; *Clayton* v. *Corby*, 2 Q. B. Rep. 813; 2 G. & D. 174; and a special plea would be bad, *England* v. *Wall*, 10 M. & W. 699. Unity of title is a *primâ facie* case of unity of possession; *Id. ibid.*

(*l*) This replication must show that the plaintiff is the person entitled to the reversion expectant on the determination of the life estate; *Wright* v. *Williams*, 1 M. & W. 77, 1 T. & G. 375, S. C.

(*m*) See 1 Taunt. 436.

deny such right, as in the above form, following the language of the plea, and concluding to the country. This rule has been most ably deduced from the cases in the books by Mr. Serjeant Williams, in 1 Saund. 103 b, where he states, "that courts of justice discourage unnecessary prolixities in pleading, because they tend to expense and delay, and that therefore, where a defendant cannot take any new or other issue in his rejoinder than the matter he had pleaded before, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, then the plaintiff ought to conclude to the country; as where the plea states a defect of fences, a prescription for a right of common or way, &c. in which the better and shorter method is directly to deny the fact of defect of fences, prescription, and the like, without a formal traverse, and conclude to the country," 1 Lord Raym. 641. In denial of the prescriptive right of way, &c. the replication will be similar to the form denying the right of common, except in the part in italics, which must necessarily be according to the facts and the language of the plea.

See a form of replication to a plea of right of way, showing a stopping up under Highway Act, 1 Marsh. 261.

XXV. NEW ASSIGNMENTS.

I. TO PLEAS IN ABATEMENT.

On the —— day of ——, A.D. ——.

To a plea of non-joinder, that the action is on different *promises*.

B. agt. D. } And the plaintiff says, that he issued his said writ and declared thereon, not for the non-performance of the promises mentioned in the said plea, and therein alleged to have been made by the defendant and the said E. F. jointly, but for the non-performance by the defendant of other and different promises made by the defendant alone to the plaintiff, to wit, the promises in the said declaration mentioned, made as therein alleged, and which were and are other and different promises to the promises in the said plea mentioned and therein alleged to have been made by the defendant and the said E. F. jointly. And this the defendant is ready to verify; wherefore he prays judgment and his damages, by reason of the non-performance of the said promises above newly assigned, to be adjudged to him, &c. [*Counsel's signature.*]

II. TO PLEAS IN BAR.

1. IN ASSUMPSIT.

IN ASSUMPSIT.

New assignment to a plea of payment, that the action is for breach of other promises. (*a*)

And the plaintiff, as to the plea of the defendant by him —— above pleaded, says, that he sued out his writ in this cause and brought his suit thereupon against the defendant, not for the performance of the promises in the said plea of the defendant mentioned, and in respect whereof the defendant paid the said sum of money in that plea mentioned, but for the non-performance of other and different promises made by the defendant to the plaintiff, in manner and form as the plaintiff hath above thereof in his declaration complained against him the defendant. And this the plaintiff is ready to verify, wherefore &c.

(*a*) See *Alston* v. *Mills*, 9 A. & E. 248; 1 P. & D. 197, S. C., and *ante*, 433, note (*x*). As to new assigning a ratification after age, to plea of infancy, see *ante*, 426, note (*t*). It seems that a new assignment is not necessarily to be understood as admitting the truth of the facts alleged in the plea, and that it may in some cases be treated as nothing more than an assertion that the trespass or grievance which the plea attempts to justify is not the trespass or grievance in respect of which the plaintiff is seeking to recover; *Brancker* v. *Molyneux*, 1 M. & G. 710. Where to a declaration by drawer against acceptor of a bill of exchange, the defendant pleaded payment in satisfaction of a bill of exchange, and averred that the bill in the declaration was the same identical bill mentioned in the plea; it was held, that the plaintiff could not reply that the bills were not identical, but must new assign; *Wheeler* v. *Senior*, 7 M. & W. 562; 9 Dowl. 270, S. C.; see also *Heydon* v. *Thompson*, 1 A. & E. 210.

IN ASSUMPSIT.

Commence as in last form.] Saith, that he issued his writ and declared thereupon, not for the non-performance of the said promises in the said plea of the defendant mentioned, and in respect whereof the said judgment therein also mentioned was so recovered as aforesaid, but for the non-performance of other and different promises made by the defendant to the plaintiff, in manner and form as the plaintiff hath above thereof complained against the defendant. And this the plaintiff is ready to verify: wherefore, inasmuch as the defendant hath not answered the said complaint of the plaintiff as to the said breach and non-performance of the said promises in the said declaration mentioned, and so newly above assigned as aforesaid, he the plaintiff prays judgment and his damages by reason of the non-performance thereof to be adjudged to him, &c.

To a plea of judgment recovered, new assignment that the action was brought for breaches of contracts different to those mentioned in the plea. (*b*)

And as to the plea of the defendant by him [secondly] above pleaded, the plaintiff says, that although true it is that the mutual promises in the declaration in this action mentioned are the same as the mutual promises in the declaration in which the said order in the plea mentioned was made, yet the plaintiff issued his writ in this action and declared thereupon, not for the recovery of damages for the breaches of promise, for the purpose of compensating and satisfying and ascertaining which and touching which the said order in the plea mentioned was made, nor for any of such damages, nor in respect of any of such breaches, but for the recovery of damages for another breach, to wit, the breach by the defendant in the manner and form by the plaintiff above assigned of the promise above and also in the declaration in the action in which the said order was made mentioned. And this the plaintiff is ready to verify, &c.

Another form to plea of former action terminated by a judge's order. (*c*)

And as to the plea of the defendant by him [secondly] above pleaded, the plaintiff says, that only a part, to wit, £3 parcel &c. accrued due to the plaintiff as the wages of him the plaintiff before he became and was drunk as aforesaid, and that the residue of the monies, to wit, £7, accrued due to the plaintiff for wages as aforesaid after he had been and was so drunk as aforesaid, and after the defendant had notice thereof as aforesaid, and that he the plaintiff not only brings his action and has declared in the declaration for the said monies, parcel &c. which had accrued due to him the

To plea of forfeiture in action for wages, new assignment that the wages accrued due subsequent to forfeiture. (*d*)

(*b*) See the forms, 3 Wentw. 151 to 153, and a form of a replication, *ante*, 436; 6 T. R. 607; 3 Wils. 304; 3 B. & C. 235. The form in 3 Wentw. appears too prolix. In 3 Lev. 92, it was held, that to a justification in trespass, concluding with a statement that the trespasses mentioned in the plea were those mentioned in the declaration, the plaintiff could not reply that *they were not the same*, without showing some other trespass; and this seems proper, in order that the defendant may have an opportunity of pleading to the new assignment; see also another form, 4 T. R. 146, and see the plea to this new assignment, 3 Wentw. 163; and as to new assignments in general, 2 Saund. 299, note 6; *ante*, vol. i. Index, "*New Assignment.*" From the case in 1 Esp. Rep. 452, It appears, that whenever the plaintiff has in truth recovered a judgment for a cause of action similar to that mentioned in the declaration, and the defendant pleads such recovery in bar, a new assignment is necessary. According to 3 B. & Cres. 235; 6 T. R. 607; 3 Wils. 304; it would seem that the plaintiff may take issue on the fact of the promises being the same, by a replication denying that allegation in the plea. See form of new assignment and pleadings thereon in assumpsit on a bill of exchange, *Heydon* v. *Thompson*, 1 Ad. & El. 210; *sed quære*, see *Solly* v. *Neish*, 2 Crom. M. & Ros. 355. See also note (*a*) in last page.

(*c*) See *Bristowe* v. *Fairclough*, 1 M. & G. 147.

(*d*) See *Monkman* v. *Shepherdson*, 11 A. & E. 411; 3 P. & D. 182, S. C.

In Assumpsit.

plaintiff for the wages and salary of him the plaintiff in respect of the services done and performed by the plaintiff before he the plaintiff had been and was drunk, as in the second plea mentioned, but also for the said monies which had accrued due from the defendant to the plaintiff after he so became drunk, and after notice thereof to the defendant. And this the plaintiff is ready to verify, &c.

In Trover.

2. In Trover.

New assignment to plea of justification. (*e*)

And as to the plea of the defendant by him [fourthly] above pleaded, the plaintiff says that he issued his writ and declared thereupon, not for the supposed conversion in that plea mentioned, but for that the defendant, before the commencement of this suit, to wit, on &c. had converted and disposed to his own use [divers bales of cotton], of which the plaintiff was lawfully possessed as of his own proper goods and chattels, different to and other than the said [bales of cotton] in the introductory part of that plea mentioned, to wit, bales of cotton of great value, to wit, of &c.; and also for that the defendant had converted and disposed of the last mentioned bales of cotton on other and different occasions and times, and for other and different purposes, and in another and different manner, than in the said plea mentioned, in manner and form &c., and which grievances above newly assigned were other and different grievances from and than the supposed grievances in the said last plea mentioned and therein attempted to be justified; wherefore, inasmach as the defendant has not answered the grievances above newly assigned, the plaintiffs pray judgment and their damages, &c.

In Trespass to Persons.

3. In Trespass to Persons.

To plea of *son assault demesne*, new assignment that the action was brought for a *different* assault. (*f*)

Saith, that he the plaintiff issued his writ in this suit, and declared thereupon, not for the trespasses in the introductory part of the [second] plea mentioned, but for that the defendant, on the said —— day of ——, A. D. ——, with force and arms, &c. upon another and a different occasion, and for another and different purpose than in the said plea mentioned, made another and different assault upon the plaintiff than the said assault in the said [second] plea mentioned, and then beat, bruised, wounded and ill-treated (*g*) the plaintiff, in manner and form as the plaintiff hath above thereof complained against the defendant, and which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said [second] plea mentioned. And this the plaintiff is ready to verify; wherefore inasmuch as the defendant hath not answered the said trespasses above newly assigned, the plaintiff prays judgment, and his damages by him sustained on occasion of the committing thereof to be adjudged to him, &c.

(*e*) See *Brancker* v. *Molyneux*, 1 M. & G. 710.

(*f*) See the forms, 9 Wentw. 10; Index, cxxiv. When this new assignment is proper, and when not, see 10 East, 81, in notes; 16 East, 82; 1 Saund. 299, n. 6; 2 T. R. 172 to 177; *ante*, vol. i. Index, "*New Assignment.*" As to the necessity in all cases to *reply or new assign*, except to a plea of *son assault demesne*, see *Reece* v. *Taylor*, 1 Harrison, 15, 16, per Littledale J.; 4 Nev. & Man. 469, S. C.; *Thomas* v. *Marsh*. 5 Car. & P. 597, note *a*.

(*g*) This statement must correspond with the averments in the declaration. It would seem sufficient to say, "*committed the said several trespasses in the said declaration mentioned.*"

De injuriâ absque residuo, &c. admitting the writ and warrant, and new assignment as follows:] And the plaintiff further saith, that he issued his writ in this suit, and declared thereupon, not only for the said assaulting the plaintiff in the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for the said space of one day, part of the said time in the said declaration mentioned, but also for that the defendant, on the said —— day of ——, A. D. ——, before the issuing of the said writ in the said [last] plea mentioned, and on another and different occasion than by virtue of the said writ, or in execution thereof, made an assault upon the plaintiff, and then beat, bruised, wounded and ill-treated him, and then imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of [one day], residue of the said time in the said declaration mentioned, contrary to the laws and customs of this realm, and against the will of the plaintiff, which said assault and imprisonment above newly assigned is another and different assault and imprisonment than the said assault and imprisonment in the said [last] plea mentioned, and thereby attempted to be justified. And this the plaintiff is ready to verify; wherefore, &c.

In Trespass to Persons.

To justification under process, new assignment of an imprisonment before issuing of process. (*h*)

See form in *Thomas* v. *Marsh*, 5 Car. & Payne, 597, note (*a*); *Reece* v. *Taylor*, 1 Harr. & Wol. 15, 16; 4 Nev. & Man. 469, S. C.

New assignment, or replication of excess.

4. In Trespass to Personal Property.

In Trespass to Personal Property.

And as to the pleas of the defendant by him [secondly and lastly] above pleaded, the plaintiff saith, that he sued out his writ in this cause, and brought his said suit thereupon against the defendant, not only for the said trespasses in the said [second and last] pleas respectively mentioned, and thereby attempted to be justified, but also for that the defendant, on the —— day of ——, A. D. ——, out of the said pretended ways in those pleas mentioned, or either of them, [seized (*k*) and took the said cart in the said declaration mentioned, and drew the said staple, and broke, damaged and spoiled the same; and also the said padlock with which the said cart was fixed and fastened to a certain post, out of the said supposed way, and removed the said cart, and seized, took and carried away the same, and converted and disposed thereof to his own use], (*k*) in manner and form as the plaintiff hath above thereof complained against him; which said trespasses above newly assigned are other and different trespasses from the said trespasses in the said [second and last pleas mentioned, and thereby] attempted to be justified. And this the defendant is ready to verify; wherefore &c.

To plea, justifying removal of cart, &c. under a right of way, new assigning *extra viam*. (*i*)

And as to so much of the said last mentioned plea of the defendant, as relates to the seizing, taking and carrying away of the said goods and

New assignment that the corn, &c. was different corn to that mentioned in the plea.

(*h*) See the forms, 9 Wentw. Index, cxxiv. As to new assignments in general, and when this is necessary, see 2 Wils. 3; 10 East, 81, 73, 76; 16 East, 82; 4 Taunt. 98; see 1 Saund. 299, n. 6; 2 T. R. 172 to 177; *ante*, vol. i. Index, "*New Assignment.*" See replication of wrongful detainer after discharge by the plaintiff, 2 T. R. 172.

(*i*) See the form and law referred to in note (*f*) last page; and 10 East, 73.

(*k*) These statements must agree with the statements in the declaration.

In Trespass to Personal Property.

chattels in the said declaration mentioned, except the said hay and grass, parcel of the same goods and chattels, and converting and disposing thereof to his own use, the plaintiff saith, that the wheat, rye, barley, peas and oats in the said declaration mentioned, were certain quantities of wheat, rye, barley, peas and oats of the plaintiff, which grew in the said close called ——, and which, before the committing of the said trespasses in the said declaration mentioned, were cut down and reaped by the plaintiff, and were other than and different from the said corn in the said declaration mentioned, and no part of the said goods and chattels in the said last plea of the defendant mentioned. And this the plaintiff is ready to verify; wherefore, &c.

In Trespass to Real Property.

4. In Trespass to Real Property.

To a plea of right of way, traverse of right of way, and new assignment, unnecessary damage and *extra viam*, &c. (*l*)

To the end of the replication, traversing the right of way, &c. if intended to be traversed, and then new assign as follows:] And the plaintiff further saith, that he issued his writ against the defendant and declared and brought his said action thereupon, not only for the several trespasses in the introductory part of the said [second] plea mentioned, and therein attempted to be justified, but also that the defendant, on* the said several days and times in the said declaration mentioned, with force and arms &c., on other and different occasions than those in the said plea mentioned, and in a greater degree and to a greater extent, and with more force and violence, than was necessary for

Unnecessary damage. (*m*)

(*l*) See the forms, 9 Wentw. Ind. cxxiv. and the law; 1 Saund. 299, 300, note 6; 10 East, 73, 76; 9 Wentw. 238; and see *Allen* v. *Gomme*, 11 A. & E. 759; *ante*, vol. i, Index, "*New Assignment*." If in fact there were a right of way, but the plaintiff proceeds for a different trespass, he should not traverse the plea, but should merely new assign as in the next form. On a plea of *liberum tenementum* to an action for a trespass to a close named in the declaration, the defendant is entitled to a verdict, if he establish a title to *that part* of the close on which the trespass was committed, and he is not bound to prove a title to the whole close; *Smith* v. *Royston*, 8 M. & W. 381. Where to trespass for breaking and entering the plaintiff's close (which was set out by abuttals) and pulling down certain posts and bars standing thereon, the defendants pleaded that there was a public footway over the close, and that the defendants, because the posts and bars obstructed the way, pulled them down; and the replication traversed the footway; it was held, that on these pleadings the defendants were entitled to a verdict on proof of a right of footway in any direction over the close, and were not bound to prove a way over the place where the posts and bars stood; *Webber* v. *Sparkes*, 10 M. & W. 485. Where the declaration complained of breaking and opening divers doors of the plaintiff's dwelling-house and breaking to pieces their locks, &c. to which the defendants pleaded a justification under a writ of *fieri facias*, and that, being lawfully in the house, they could not carry away the goods without opening the outer door, and the plaintiff was not there to open it; and the plaintiff then new assigned that he brought his action for defendant's breaking the outer door of the house, and then new assigned again that he brought his action for defendant's breaking &c. the locks &c. belonging to the outer door and wherewith it was fastened; it was held that the second new assignment was not bad, inasmuch as under the complaint of breaking the outer door, the plaintiff might give evidence of breaking the locks, &c., and that the second new assignment and the plea to it raised the question whether the sheriff under the circumstances in the plea, might break open the outer door, as if the declaration had been merely for breaking the lock, &c. of the outer door; *Pugh* v. *Griffiths*, 7 A. & E. 837. Where to an action of trespass for breaking the plaintiff's close, and laying a railroad thereon, the defendant justified under a reservation to him in certain deeds of all mines and coals, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pits, and the plaintiff new assigned to the plea that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which there was judgment by default; and it was held, that on these pleadings the plaintiff could not dispute that some species of railroad was within the reservation, but that the question was, whether the railroad was constructed in a direction or in a manner unauthorised by the reservation; *Dand* v. *Kingscote*, 6 M. & W. 174.

(*m*) Proof of, see 7 B. & C. 346.

IN TRESPASS TO REAL PROPERTY.

Extra viam.

abating and removing the said alleged stoppages and obstructions in the said plea mentioned, and for opening the said supposed way there, committed the said several trespasses in the introductory part of the said [second] plea mentioned; and also for that the defendant, on the said several days and times in the said declaration mentioned, with force and arms &c. broke and entered the said close of the plaintiff in the said declaration mentioned and with his feet in walking (*n*) trod down, trampled upon, consumed and spoiled the grass and herbage of the plaintiff there growing, of great value, to wit, of the value aforesaid, on other and different occasions, and for other and different purposes than in the said [second] plea mentioned, and in other and different parts of the said close, out of the said way in that plea mentioned, in manner and form as the plaintiff hath above thereof complained against the defendant, which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said [second] plea mentioned, and therein attempted to be justified; wherefore, inasmuch as the defendant hath not answered the said trespasses above newly assigned, he the plaintiff prays judgment and his damages by him sustained, on occasion of the committing thereof, to be adjudged to him &c.

The like, merely new assigning. (*o*)

And as to the said plea of the defendant by him [secondly] above pleaded, the plaintiff saith, that he issued his writ in this suit and declared thereupon, not for the said several trespasses in the introductory part of the said [second] plea mentioned, but for that the defendant, on &c. [*as in the preceding form from the asterisk to the end.*

To a plea of distress for rent,

See *Ladd* v. *Thomas*, 12 A. & E. 117; 4 P. & D. 10, S. C.

new assignment, that after the defendant entered, and after the plaintiff made a tender of the rent and charges before impounding, the defendant remained in the dwelling-house, &c. (*p*)

(*n*) These statements must correspond with those in the declaration.

(*o*) See 4 Taunt. 98.

(*p*) Trespass lies for a wrongful continuance in possession after a distress made; *per* Lord Denman, C. J., *Ladd* v. *Thomas*, 4 P. & D. 14; 12 A. & E. 117, S. C. This replication must allege the tender to have been made before the goods were impounded, and the omission is not cured by verdict, and there is no difference in this respect between a distress damage feasant and one for rent; *Id. ibid.*

XXVI. REJOINDERS IN GENERAL.

Similiter to replication concluding to the country.

In the Q. B. [*or* " C. P." *or* " Exchequer."]

On the —— day of ——, A. D. ——.

C. D. ats. A. B. } And the defendant, as to the replication of the plaintiff to the said [second] plea of the defendant, and which the plaintiff hath prayed may be inquired of by the country, doth the like.

Commencement of rejoinder to a special replication. (*a*)

And the defendant, as to the replication of the plaintiff to the [second] plea of the defendant, saith, that &c. [*here state the subject-matter of the rejoinder, and if it deny the replication, conclude thus:*]

Conclusion to the country.

And of this the defendant puts himself upon the country, &c.

Conclusion with a verification.

And this the defendant is ready to verify, &c.

(*a*) The commencement of the rejoinder sometimes is thus:—" *and the defendant, as to the said plea of the plaintiff by him above pleaded, by way of reply to the said plea of the defendant, by him secondly above pleaded in bar, as to the said supposed trespasses in the introductory part of that plea mentioned, &c.*" But this form seems to be unnecessarily prolix.

XXVII. REJOINDERS IN ABATEMENT.

Rejoinder that defendant did not neglect to obtain his certificate for an entire year as alleged in replication. (a)

Says, that he ought not by reason of any thing by the plaintiff in his said replication alleged to answer to the said writ and declaration of the plaintiff in the said Court here, because he says, that he did not after the said —— day of ——, A. D. —— aforesaid, neglect to obtain a certificate of his being admitted, sworn and enrolled as such attorney of the said Court of our said lady the queen of the Bench as aforesaid, in the manner directed by the said act of parliament for the space of one whole year, in manner and form as the plaintiff hath in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

Rejoinder to a replication to a plea of coverture.

See the form in *Stretton* v. *Busnach*, 1 Bing. N. C. 140.

(a) The language of the rejoinder will of course depend on the wording of the replication.

XXVIII. REJOINDERS IN BAR IN ASSUMPSIT.

Usury.

Rejoinder [to a replication, that at time plaintiffs discounted the bill they knew of the *usury* mentioned in the plea.

1. Usury.

And the defendant, as to the replication of the plaintiffs to the [second] plea of the defendant, saith, that the plaintiffs, at the time the said bill was indorsed to them, and at the time they discounted the same as aforesaid, had actual notice that the said bill had been drawn, accepted, indorsed and given for the usurious and upon the usurious contract in the said plea to the said [first] count mentioned. And of this the defendant puts himself upon the country, &c.

To Insolvency.

Rejoinder [to replication to plea of discharge under Insolvent Act, that the note was made on account of a debt contracted before plaintiff's discharge, and that the other money accrued before the adjudication.

2. To Insolvency.

And the defendant, as to so much of the said replication of the plaintiff to the said last plea as relates to the said promissory note therein mentioned, says, that although true it is that the said promissory note in the said [first] count of the said declaration mentioned was made and delivered to the plaintiff by the defendant after the said alleged adjudication; yet for rejoinder in this behalf he says, that the said promissory note was made and delivered in respect of a debt accrued due from the defendant to the plaintiff before the making of the said promissory note, and before the said adjudication thereon in the said plea mentioned. And this the defendant is ready to verify. And as to so much of the said plea as relates to the said sum of £—— therein mentioned, the defendant says, that the said sum of £—— did not accrue after the said adjudication in the said plea mentioned. And of this the defendant puts himself upon the country, &c.

To replication alleging that the indenture set up in the plea was executed by the insolvent when insolvent within three months of insolvency, and with intent to petition &c., rejoinder denying the intention.

See Peacock v. *Harris*, 5 A. & E. 451.

To Infancy.

To a replication to a plea of infancy, that goods &c. were necessaries, that they were

3. To Infancy.

And the defendant, as to the replication of the plaintiff by him above pleaded, says, that the said meat, drink, washing, lodging and other supposed necessaries in the said [first and second] counts of the said declaration respectively mentioned to have been found and provided by the plaintiff for

the defendant, and the said goods, wares and merchandize in the said [third and fourth] counts of the said declaration respectively mentioned to have been sold and delivered by the plaintiff to the defendant, were not necessary or suitable to the then degree, estate and condition of him the defendant, and that the said money in the said [sixth] count of the said declaration mentioned to have been paid, laid out and expended by the plaintiff to and for the use and on the account of the defendant, was not so paid, laid out and expended by the plaintiff in and about the purchase of such necessaries, in manner and form as the plaintiff hath above in his said replication to the said [second] plea of the defendant in that behalf alleged. And of this the defendant puts himself upon the country, &c.

To Infancy.

not necessaries. (a)

Saith, that the defendant did not after he attained the age of twenty-one years, and before the commencement of this suit, assent to, ratify or confirm the said several promises in the said declaration mentioned, or any or either of them, in manner and form as the plaintiff hath above in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

To a replication to a plea of infancy, that defendant, when he came of age, confirmed the promises, that he did not confirm them. (b)

4. To Tender.

To Tender.

Saith, that the plaintiff did not, after the time when the said alleged causes of action in the said declaration mentioned accrued, and before the defendant tendered and offered to pay the said sum of £—— parcel &c., as the defendant hath in his said plea in that behalf alleged, demand the said sum of £—— parcel, &c. of and from the defendant, or request him to pay the same, or any part thereof, in manner and form as the plaintiff hath above in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

To replication to plea of tender of *prior* demand, no such demand. (c)

Saith, that the plaintiff did not, after the making of the said tender in the said [last] plea mentioned, and before the commencement of this suit, demand of or request the defendant to pay to the plaintiff the said sum of £—— parcel, &c. in the said plea mentioned, in manner and form as the plaintiff hath above in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

To replication to a plea of tender of a *subsequent* demand, no such demand. (d)

5. To Set-off.

To Set-off.

Saith, that after the recovery of the said judgment, and before the commencement of this suit, he the plaintiff did not pay or satisfy to the defendant the said sum of [£798] in form aforesaid recovered, or any part thereof, in manner and form as the plaintiff hath above in that behalf alleged. And

Rejoinder to a replication of payment to plea of set-off to a judgment recovered denying payment.

(a) See form and law, *Burghart* v. *Angerstein*, 6 Car. & P. 690, 693; Lil. Ent. 107; 1 Rich. C. P. 158; Mor. 223. See replication, *ante*, 425.

(b) As to this rejoinder and the evidence, see 1 T. R. 648.

(c) If there was a tender at the time of the prior demand, then rejoin that tender.

(d) See the replication, *ante*, 431, and the forms; 3 Wentw. 181; 3 Wentw. Index. As to the law, see *Coore* v. *Calloway*, 1 Esp. Rep. 116.

To Set-off.

of this the defendant puts himself upon the country, &c. And as to the said replication of the plaintiff to the residue of the said plea of the defendant by him [secondly] above pleaded, and which he hath prayed may be inquired of by the country, the defendant doth the like.

To Release.

6. To Release.

Rejoinder that the release was obtained fairly. (*e*)

Saith, that the said deed of release in the said [second] plea mentioned, was had and obtained fairly, and not by the fraud or covin of the defendant, in manner and form as the plaintiff hath above in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

To a replication to a plea of deed of composition with principal debtor, that it was agreed the defendant should not be discharged, rejoinder denying such agreement. (*f*)

See *Davidson* v. *M'Gregor*, 8 M. & W. 760.

To Statute of Limitations.

6. To Statute of Limitations.

Rejoinder that the action did not accrue within six years of issuing the writ. (*g*)

Saith, that the said several alleged causes of action in the said declaration mentioned, did not, nor did any or either of them accrue to the plaintiff within six years next before the issuing of the said writ in the said replication to the said [second] plea mentioned, in manner and form as the plaintiff hath above in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

Rejoinder of merchant's accounts. (*h*)

And the defendant, as to the replication of the plaintiff to the said second plea, says, that the said causes of action were not, nor are, nor was nor is either or any of them, nor did they or any or either of them relate to accounts still open and unsettled concerning the trade of merchandize between merchant and merchant, nor were the plaintiffs and defendants merchants, in manner and form &c. And of this the defendant puts himself upon the country, &c.

Rejoinder denying defendant's absence.

Because he saith, that at the time when the said several causes of action in the said declaration mentioned accrued to the plaintiff, he the defendant was not in any part beyond the seas, but on the contrary thereof then was in England. And of this he the defendant puts himself upon the country, &c.

To replication that defendant was beyond the seas, &c. that plaintiff did not commence his suit within six years of defendant's first return. (*i*)

Saith, that the plaintiff did not commence his said suit against the defendant within six years next after his the defendant's first return into this kingdom from beyond the seas, after the accruing of the said several causes of action unto the plaintiff, in manner and form as the plaintiff hath above in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

(*e*) See the replication, *ante*, 437, and 3 Wentw. Index, xii. and xiii.

(*f*) *Davidson* v. *M'Gregor*, 8 M. & W. 760.

(*g*) See the replication, *ante*, 441, and the forms, 3 Wentw. Index, xx. &c.

(*h*) See *Cottam* v. *Partridge*, 4 M. & G. 271, and replication, *ante*, 444.

(*i*) See the replication, *ante*, 441, and the form, 1 Wentw. 327.

To Statute of Limitations.

And the defendant, as to the said replication of the plaintiffs to the said [second] plea of the defendant, says, that the defendant did not appear in the said Court in the said replication mentioned to answer to the said J. H. according to the exigency of the said writ in the same replication mentioned, nor did the said J. H. thereupon declare against the defendant in manner and form as the plaintiffs have above in the said last mentioned replication alleged. And of this the defendant puts himself upon the country. &c.

Rejoinder, to replication to plea of Statute of Limitations in an action by executors, of the action being brought in a recent time after testator's death, that defendant did not appear, nor did testator declare in former suit. (*k*)

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8. Against Executors, &c.

Against Executors, &c.

Saith that no goods or chattels of the said E. F. deceased, at the time of his death, have since the commencement of this suit come to or been in the hands of him the defendant as administrator as aforesaid, to be administered in manner and form as the plaintiff hath in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

To replication that assets had come to hand since the commencement of the suit denying the fact. (*l*).

Saith, that the said judgment in the said [first] plea first mentioned was had and obtained for a true and just debt, really and truly due and owing to the said E. F., and not by the fraud or covin of the defendant, or with intent to defraud the plaintiff of his said debt, in manner and form as the plaintiff hath above in his said replication in that behalf alleged. And the defendant further saith, that the said judgment in the said [first] plea secondly mentioned was &c. [*similar denial to each judgment.*] And of this the defendant puts himself upon the country, &c.

To replication that the judgment against the defendants were obtained by fraud, denying the fraud. (*m*)

(*k*) See form of replication and note, *ante*, 442.

(*l*) See the form, *ante*, 444.

(*m*) See the replication, *ante*, 446, and the forms, 3 Wentw. Index, xxvi. &c.; 1 Saund. 103, in the notes, and 334, note 9. This form is proper; *Jones* v. *Roberts*, 2 Cr. & M. 219.

XXIX. REJOINDERS IN DEBT.

1. On Awards.

On Awards.

To replication stating an award, denying the award. (a)

And the defendant, as to the replication of the plaintiff to the said [second] plea of the defendant, saith, that the said E. F. and G. H. did not make any such award of or concerning the said premises in manner and form as the plaintiff hath above in his said replication alleged. And of this the plaintiff puts himself upon the country, &c.

2. On Annuity Deeds.

On Annuity Deeds.

To replication of due enrolment of annuity deed, rejoinder that it contained false statements, &c. (b)

And the defendant, as to the plaintiff's plea by way of reply to the plea of the defendant by him above pleaded in bar, says, that the said memorial therein set forth contains divers false statements and representations touching and relating to certain matters and facts material and essential to the validity of the said annuity and to the maintenance of this action, and especially in this, to wit, that the said memorial imports and represents that the consideration of and for the said annuity, to wit, £——, was paid in notes of the Governor and Company of the Bank of England, whereas in truth and in fact the said £—— was not nor was any part thereof paid to the said E. C. in notes of the Governor and Company of the Bank of England, or otherwise howsoever, in manner and form as the plaintiff has in his said plea by way of reply alleged; and so the defendant, in fact, again says, that there never was any such memorial as by the said act of parliament is required enrolled in the said High Court of Chancery according to the direction of the said act of parliament. And of this the defendant puts himself upon the country, &c.

3. On Indemnity Bonds.

On Indemnity Bonds.

To a replication to a bond conditioned for E. F. accounting, &c. that E. F. did account, &c. (c)

And the defendant, as to the replication of the plaintiff to the plea of the defendant, saith, that the said E. F., after the making of the said writing obligatory, and after he had received the said monies in the said replication mentioned and before the commencement of this suit, to wit, on &c. well and truly accounted for and paid the same sums of money received by the

(a) See the replication and the law, *ante*, 457; 11 East, 188.

(b) See plea, *ante*, 187; replication, 455. This rejoinder is not a departure from the plea; *Hickes* v. *Cracknell*, 3 M. & W. 72.

(c) See the replication, *ante*, 458, and the forms of rejoinders, 7 Wentw. Index, 616.

said E. F. as aforesaid. And of this the defendant puts himself upon the country, &c.

And the defendant, as to the said alleged breach of the said condition of the said writing obligatory in the said replication first above assigned, saith, that &c.

Rejoinder to a replication assigning several breaches of a condition of a bond to a plea of general performance.

See *Darling* v. *Gurney and another*, 2 Dowl. 101.

Rejoinder to a replication setting out *ca. sa.* on debt on recognizance, that *venue* in Middlesex and not in London, and therefore bad.

See *Darling* v. *Gurney and another*, 2 Dowl. 101.

Surrejoinder, denial and conclusion.

XXX. REJOINDER IN DETINUE.

See *Coombs* v. *Noad*, 10 M. & W. 127 ; 2 Dowl. N. S. 315, S. C., ; and Replication, *ante*, 465.

To a replication alleging tender of part of the sum claimed by a plea of lien for work &c. and that the same and no more was the reasonable price, rejoinder, that a greater sum was due.

XXXI. REPLICATIONS TO PLEAS IN REPLEVIN.

1. In General.

In General.

Similiter to plea in bar concluding to the country.

In the Queen's Bench [*or* "C. P." *or* "Exchequer."]
The —— day of ——, A. D. ——.

C. D. ats. A. B. } And the defendant, as to the said plea in bar of the plaintiff by him [first] above pleaded, and which he hath prayed may be inquired of by the country, doth the like, &c.

Commencement of a replication in replevin.

C. D. ats. A. B. } And the defendant, as to the said plea in bar of the plaintiff to the said [first] avowry [*or* "cognizance"] of the defendant, saith, that he ought not to be barred from avowing [*or* "acknowledging"] the taking of the said [cattle], goods and chattels in the said declaration mentioned in the said place in which &c. and justly &c. because he saith that &c. [*or if the replication merely re-assert matter alleged in the avowry or cognizance, say,* "because as before he saith," *&c. Here state the subject-matter of the replication, and if it be merely in denial of the plea in bar, conclude to the country as follows :*]

Conclusion to the country.

And of this the defendant puts himself upon the country, &c.

Conclusion with verification. (*a*)

And this the defendant is ready to verify ; wherefore, as before, he prays judgment and a return of the said [cattle], goods and chattels, together with his damages &c. according to the form of the statute in such case made and provided, to be adjudged to him &c.

2. For Rent, &c.

For Rent, &c.

To plea in bar of a tender, denial of tender. (*b*)

And the defendant, as to the plea in bar of the plaintiff as to the said sum of £——, residue of the said rent in the said avowry [*or* "cognizance"] mentioned, saith, that the defendant ought not to be barred from avowing [*or* "acknowledging"] the taking of the said [cattle], goods and chattels in the said declaration mentioned, in the said place in which &c. and justly &c. because he saith that the plaintiff did not tender or offer to pay to the defendant the said sum of £—— of the rent aforesaid in manner and form as the plaintiff hath above in his said plea in bar alleged. And of this the defendant puts himself upon the country, &c.

(*a*) As to this conclusion, see *ante*, 292, note (*k*).
(*b*) See the plea in bar and notes, *ante*, 447.

To a plea of tender of rent and costs of distress, denial of tender. (c)

And the defendant, as to the said plea in bar of the plaintiff to the said [avowry] of the defendant, says, that the defendant ought not to be barred from [avowing] the taking of the said cattle and horses in the said declaration mentioned, in the said place in which &c., and justly &c., because he says that the plaintiff did not, before the said impounding of the said [cattle and horses], tender or offer to pay the defendant L. the said sum of £——, so due for rent, as in the said avowry and cognizance mentioned, together with a reasonable and sufficient sum for the costs and expenses of the taking of the said distress in manner and form &c. And of this the defendant puts himself upon the country, &c.

To a plea in bar of a tender to a cognizance for rent, a subsequent demand. (d)

Commencement as in last form.] Saith, that after the said, &c. [*the day when the rent became due, as stated in the avowry*], and after the said alleged tender in that plea mentioned, and before the taking of the said goods and chattels in the said place in which &c. to wit, on &c. aforesaid, at —— aforesaid, the said E. F. demanded of the plaintiff the said sum of £——, the residue of the said rent, and required him to pay the same to the said E. F., which the plaintiff then wholly neglected and refused to do; wherefore the defendant, as the bailiff of the said E. F. well acknowledges the taking of the said goods and chattels in the said place in which &c. and justly &c. for and in the name of a distress for the said rent so due, in arrear, and unpaid to the said E. F. as aforesaid; and the said rent still remains so due and unpaid in manner and form as the defendant hath above alleged. And this, &c. [*Conclude with a verification as ante*, 516.

3. To Damage Feasant.

To a plea in bar of a demise from the defendant to the plaintiff, stating a notice to quit. (e)

Precludi non, as ante, 516.] Saith, that the defendant, after the making of the said demise in the said plea in bar mentioned, and whilst the plaintiff was possessed of the said place in which &c. under and by virtue of the said demise, as tenant thereof to the defendant, and half a year before the —— day of ——, A. D. ——, to wit, on &c. gave due notice to and then required the plaintiff to quit and deliver up the possession of the said demised premises, with the appurtenances, unto the defendant on the said —— day of ——, A. D. ——, then next following; and by means thereof, afterwards, and before the said time when &c. to wit, on the day and year last aforesaid, the said tenancy, and the estate and interest of the plaintiff in the said demised premises, and the said place in which &c. with the appurtenances, wholly ended and determined, and thereupon the defendant, after the said tenancy was so ended and determined as aforesaid, and before the said time when &c. to wit, on the —— day of —— in the same year, entered into the said place in which &c. and then and there became and was lawfully possessed thereof, and continued so possessed, until the same time when &c.; and because the said cattle, after the said demise became and

(c) See *Thomas* v. *Harries*, 1 M. & G. 696.

(d) See the plea in bar, *ante*, 477.

(e) See the plea in bar, *ante*, 483, and 7 T. R. 431. See replication to plea in bar, denying demise to plaintiff, held good, 1 D. & R. 42; 2 Saund. 319.

To Damage Feasant.

was so ended and determined as aforesaid, and whilst the defendant was so possessed as aforesaid, and at the said time when &c. were wrongfully in the said place in which &c. treading &c. [*Conclude with a verification, as ante*, 516.

To a plea in bar of defect of fences, denial of defendant's obligation to repair. (*f*)

Precludi non, as ante, 516.] Saith, that he the defendant, and all other the tenants and occupiers of the said close in which &c. for the time being, from time whereof the memory of man is not to the contrary, have not repaired and amended, nor have been used and accustomed to repair and amend, nor of right ought to have repaired and amended, nor ought the defendant before and at the said several times when &c. of right to have repaired and amended, nor still of right ought to repair and amend, the said hedge and fence between the said close of the plaintiff and the said close in which &c. when and as often as occasion hath required, to prevent cattle feeding and depasturing or being in the said close of the plaintiff from erring or escaping thereout, through the defects and insufficiency of the said hedge and fence, into the said close in which &c. and doing damage there in manner and form as the plaintiff hath above in his said plea in bar in that behalf alleged. And of this the defendant puts himself upon the country, &c.

The like, denial of defect of fences.

Precludi non, as ante, 516.] Saith, that the said hedge and fence in the said plea in bar mentioned, before or at the said time when &c. were not ruinous, prostrate or fallen down for want of needful or necessary making, repairing or amending thereof, in manner and form as the plaintiff hath above in his said plea in bar in that behalf alleged. And of this the defendant puts himself upon the country, &c.

To a plea in bar to an avowry damage feasant, stating a right of common over *locus in quo*, traversing the right of common. (*g*)

Precludi non, as ante, 516.] Saith, that the plaintiff and all those whose estate &c. [*here deny the right of common, as stated in the plea in bar, to the end of the words*, "as to the said messuage and land, with the appurtenances belonging and appertaining," *and conclude as follows*:] in manner and form as the defendant hath above in his said plea in bar in that behalf alleged. And of this the defendant puts himself upon the country, &c.

(*f*) See the pleas in bar, *ante*, 483. This replication should conclude to the country, 1 Saund. 103. The replication may be that the cattle were unruly, as *ante*, 500, or that the plaintiff turned the cattle in, as *ante*, 500; see 1 Taunt. 529.

(*g*) See the plea in bar, *ante*, 483; see the replications in trespass, *ante*, 501. Sometimes the replication concludes with a formal traverse and verification; see 2 Saund. 322. See forms, Boote's Suit at Law, 255; Plead. A. 473; but this is unnecessary and improper.

XXXII. REJOINDERS IN TRESPASS.

1. In General.

In General.

Similiter to replication, concluding to the country.

In the Q. B. [*or* "C. P." *or* "Exchequer."]

The —— day of ——, A. D. ——.

C. D. ats. A. B. } And the defendant, as to the replication of the plaintiff to the said [second] plea of the defendant, and which the plaintiff hath prayed may be inquired of by the country, doth the like.

Rejoinder to a replication.

And the defendant, as to the replication of the plaintiff to the said [third] plea of the defendant, saith, that &c. [*Here state the subject-matter of the rejoinder, and the conclusion to the country will be as follows:*]

Conclusion to the country.

And of this the defendant puts himself upon the country, &c.

Conclusion with a verification and prayer of judgment.

And this the defendant is ready to verify, &c.

2. To Persons, &c.

To Persons, &c.

Rejoinder to replication of excess, denying the illegal excess.

Commencement as supra.] Saith, that he did not to a greater degree, or with more force or violence, than was necessary for the said purpose in the said [last] plea mentioned, commit the said alleged trespasses in the introductory part of the said [last] plea mentioned, in manner and form as the plaintiff hath in his said replication in that behalf alleged. And of this the defendant puts himself upon the country, &c.

3. To Real Property.

To Real Property.

To a replication of a demise to the plaintiff, a notice to quit.(a)

Commencement as supra.] Saith, that the defendant, after the making of the said demise, &c. [*state the notice to quit, and the determination of the tenancy, precisely as in the form, ante,* 517, *saying,* "before either of the said times when &c." *instead of* "the said time when &c." *and then proceed as follows:*] and thereupon he the defendant, after the said tenancy was so ended and determined as aforesaid, to wit, at the said several times when &c. entered into the said [dwelling-house] in which &c. and committed the said alleged trespasses in the introductory part of the said

(a) As to traversing a demise as the demise of the *defendant* when the replication alleged the demise to have been by the *agent* of the defendant, see *Wilkins* v. *Boulcher*, 3 M. & G. 807.

To Real Property.

[second] plea mentioned, as he lawfully might for the cause aforesaid. And this, &c. [*Conclude with a verification, as ante*, 519.

Rejoinder in trespass that the notice to quit was waived. (*c*)

Says, that the plaintiff, after the giving the notice in the said replication mentioned, to wit, on &c. waived, relinquished and abandoned such notice, and then assented and agreed to the continuance of the said demise. And this, &c. [*Conclude with a verification, as ante*, 519.

Rejoinder to replication, claiming title under a demise from D., that after demise D. surrendered. (*d*)

That after the making of the said demise by the Duke to K., and whilst the Duke was seised in fee of the reversion of the said close, expectant on the determination of the said term of K. therein, and before the making of the said demise from the said Duke to the defendant G. W., and also before any of the said times when &c. to wit, on the 19th March, 1835, all the estate, term and interest of K. in the said close was ended and determined by surrender thereof then made by K. to the Duke.

Sur-rejoinder.

That all the estate, term and interest of K. was not ended and determined by surrender thereof made by him to the Duke in manner and form as in the rejoinder alleged.

To a replication that the defendant's right of entry did not accrue within 20 years under 3 & 4 W. 4, c. 27, rejoinder that the close was not possessed by the plaintiff adversely. (*e*)

And the defendant, as to the replication of the plaintiff to the said [second] plea of the defendant, says, that no acknowledgment of the title of the person entitled to the said close in which &c. according to the act of parliament in the replication mentioned, was given to the person entitled to the said close, or his agent, at any time before the passing of the said act of parliament; and that the said W. H., at the time of the passing of the act, claimed to be and was entitled to the said close in which &c. as in the said plea mentioned; and that the possession of the said close in which &c. was not at the time of the passing of the said act of parliament adverse, nor was the said close in which &c. then possessed by the plaintiff or any other person adversely to the right or title of the said W. H. or any person through whom he claims. And the defendant further says, that the said entry was made and the said supposed trespasses committed in manner and form as in the said plea alleged, and for the reasons and causes therein mentioned, within five years next after the passing of the said act of parliament. And this the defendant is ready to verify, &c.

Rejoinder re-asserting right of common, &c. as stated in the plea. (*f*)

And the defendant, as to the replication of the plaintiff to the said [second] plea of the defendant, as before, saith, that he the defendant, and all those whose estate he now hath, and at the said several times when &c. had, of and in the said [messuage and land] with the appurtenances in the said [second] plea mentioned, for the time being [from time whereof the

(*c*) See the sur-rejoinder, *post*, 523.

(*d*) See form in *Rees* v. *Williams*, 2 C. M. & R. 582.

(*e*) See 3 & 4 W. 4, c. 27, s. 15; *Cully* v. *Doe* dem. *Taylerson*, 3 P. & D. 539. The rejoinder admits that W. H.'s right of entry did not accrue within twenty years, and puts the case on the question of adverse possession; *Holmes* v. *Newlands*, 11 A. & E. 44; 3 P. & D. 128, S. C.

(*f*) The replication, denying a right of common, or any other prescriptive right, or the obligation to repair, as stated in the plea, should conclude to the country, and without a formal traverse; 1 Saund. 103 b; 7 B. & C. 346. If the replication be improperly concluded with a formal traverse and verification, the rejoinder must re-assert the subject-matter of the plea, as in the above form.

memory of man is not to the contrary (*g*)] have had, and have been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture in, upon and throughout the said close in which &c. for all his and their commonable cattle, *levant* and *couchant*, in and upon the said messuage and land, with the appurtenances, in every year, at all times of the year, as to the said [messuage and land] with the appurtenances belonging and appertaining, (*h*) in manner and form as he the defendant hath in his said [second] plea above alleged. And of this the defendant puts himself upon the country, &c.

Rejoinder to a replication, that defendant's cattle was unruly, and broke the fence, that the cattle escaped by the defect of fence mentioned in plea, and not through any breach of fence, as alleged in the replication.

Saith, that the said cattle of the defendant escaped out of the said common or waste in the said [second] plea in that behalf mentioned, into the said close in which &c. called &c. through the defect of the said fences in the said [second] plea in that behalf mentioned, in manner and form as the defendant hath above in his said [second] plea in that behalf above alleged, and not through any breach of the said fence, as in the said replication to the said [second] plea mentioned. And this the defendant prays may be inquired of by the country, &c.

Rejoinder to a replication, setting up the existence of a life estate during the exercise of a right of profit *à prendre*, pleaded under the 2 & 3 W. 4, c. 71, denying the existence of such life estate. (*i*)

See *Clayton* v. *Corby*, 2 Q. B. Rep. 813; 2 G. & D. 174, S. C.

XXXIII. SUR-REJOINDER IN ASSUMPSIT.

Sur-rejoinder, to rejoinder to a replication to plea of plaintiff's discharge under Insolvent Act, that the note was not made on account of a debt contracted before plaintiff's discharge.

And the plaintiff, as to the said rejoinder of the defendant, as to so much of the said replication as relates to the said promissory note therein mentioned, says, that the said promissory note was not made or delivered in respect of a debt accrued due from the defendant to the plaintiff before the said alleged adjudication in the said plea mentioned, in manner and form as the defendant hath above in his said rejoinder alleged. And this the plaintiff prays may be inquired of by the country, &c.

(*g*) If these words be not in the replication, they should be omitted in the traverse in this rejoinder.

(*h*) As to these words, see 1 Saund. 346 c.

(*i*) Under this issue, though the life estate did in fact exist during part of the thirty years next before the suit, the defendant is entitled under the 7th section of the statute to exclude it altogether in the computation, *Clayton* v. *Corby*, 2 Q. B. Rep. 813; 2 G. & D. 174, S. C.

XXXIV. REJOINDERS AND SUR-REJOINDERS IN REPLEVIN, TRESPASS, &c.

Common form of a sur-rejoinder. (a)

In the Q. B. [*or* " C. P." *or* " Exchequer."]

The —— day of ——, A. D. ——.

A. B. agst. C. D. } And the plaintiff, as to the rejoinder of the defendant to the replication of the plaintiff to the said [second] plea of the defendant, saith, that &c. [*State the subject-matter of the sur-rejoinder, and if merely a denial of the rejoinder, conclude thus:*] And this the plaintiff prays may be inquired of by the country, &c.

Conclusion to the country.

Conclusion with a verification in trespass.

If the sur-rejoinder be of new matter, conclude with a verification similar to the conclusion of a replication. The form in trespass is as follows:] And this the plaintiff is ready to verify, &c.

Rejoinder in replevin. (b)

And the plaintiff, as to the replication of the defendant to the plea in bar of the plaintiff to the said avowry [*or* " cognizance"] of the defendant, saith, that the defendant ought not to avow the taking of the said [cattle] in the said [close] in which &c. and justly &c., because he saith, that &c. [*Here state the subject-matter of the rejoinder, and conclude to the country, or with a verification, as in a plea in bar, as ante, 473.*

Sur-rejoinder in trespass, that the notice to quit was waived.

Commencement as above.] Saith, that after the giving of the said notice in the said rejoinder mentioned, and before the expiration of the said tenancy, to wit, on &c., the defendant waived, relinquished and abandoned the said notice, and then assented and agreed with the plaintiff to the continuance of the said tenancy in the said replication mentioned, and the said tenancy did continue from thenceforth until and at and after the said time when &c. And this, &c. [*Conclude with a verification, as supra.*

To rejoinder in trespass, that the close was not possessed adversely to the defendant, sur-rejoinder that it was possessed adversely, to wit, by W. S. (c)

And the plaintiff, as to the rejoinder of the defendant to the replication of the plaintiff to the said [second] plea of the defendant, says, that the possession of the said close in which &c. at the time of the passing of the said act, was adverse, and the same was then possessed, to wit, by one W. S. adversely to the said alleged right and title of the said W. H. And this the plaintiff prays may be inquired of by the country, &c.

(a) See forms, Boote's Suit at Law, 222.

(b) See the forms of rejoinders in replevin, 6 Wentw. 6, 13; Lil. Ent. 360; Boote's Suit at Law, 260; Plead. A. 478, 479.

(c) The sur-rejoinder was held not to be contradictory to the declaration, as the plaintiff might have been in possession at the time of the trespass, though W. S. was in possession at the passing of the act; *Holmes* v. *Newlands*, 11 A. & E. 44; 3 P. & D. 128, S. C.

XXXV. REBUTTER AND SUR-REBUTTER IN TRESPASS.

In the Q. B. [*or* " C. P." *or* " Exchequer."]

The —— day of ——, A. D. ——.

Rebutter denying the waiver of the notice to quit.

C. D. ats. A. B. } And the defendant, as to the sur-rejoinder of the plaintiff to the rejoinder of the defendant to the replication to the said [second] plea of the defendant, saith, that he defendant did not waive, relinquish or abandon the said notice, or assent or agree with the plaintiff to the continuance of the said tenancy in the said replication mentioned, nor did the same continue in manner and form as the plaintiff hath above in his said sur-rejoinder in that behalf alleged. And of this the defendant puts himself upon the country, &c.

In the Q. B. [*or* " C. P." *or* " Exchequer."]

The —— day of ——, A. D. ——.

Sur-rebutter *similiter*.

A. B. ats. C. D. } And the plaintiff, as to the said rebutter of the defendant, and whereof he hath put himself upon the country, doth the like.

XXXVI. PLEAS, &c. TO NEW ASSIGNMENTS.

PLEAS.

1. PLEAS.

General issue to new assignment. (a)

In the Queen's Bench [*or* "C. P." *or* "Exchequer."]

The —— day of ——, A. D. ——.

D. ats. B. } And the defendant, as to the said several alleged trespasses above newly assigned, saith, that he is not guilty thereof, or of any part thereof, in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant puts himself upon the country, &c.

Commencement of a special plea to a new assignment. (b)

And for a further plea in this behalf, as to the said several alleged trespasses above newly assigned, the defendant saith, that &c.

Conclusion with a verification and prayer of judgment.

And this the defendant is ready to verify, &c.

Confession of trespasses newly assigned, and relinquishment of the general issue to declaration, so far as it relates to such trespasses. (c)

And the defendant, as to the said trespasses as above newly assigned, truly here in court confesses the said action of the plaintiff, and that he the defendant was and is guilty thereof, [and that the plaintiff hath sustained damages in respect thereof to a small amount, to wit, to the sum of 10*s*. [*a sum sufficient to cover the full damages for the excess,*] which he the defendant is ready and willing to pay to the plaintiff.] (d) And the defendant fully relinquishes and abandons so much of his said first plea by him above pleaded as traverses or denies, or can be deemed or construed to traverse or deny, the said trespasses above newly assigned, or any part thereof, or that the plaintiff hath sustained damages in respect thereof, &c.

To new assignment of trespass *extra viam*, to plea of right of way, plea that the plaintiff had stopped up the right of way, wherefore, &c. (e)

See *Ellison* v. *Iles*, 11 A. & E. 655; 3 P. & D. 391, S. C.

(a) When not advisable to plead to the new assignment, but to suffer a judgment by default, see *ante*, vol. i. p. 669.

(b) See a plea of set-off to a new assignment in assumpsit, 3 Wentw. 163.

(c) As to the expediency of this form of pleading, in order to avoid the costs of the trial and inquiry, see 9 B. & C. 613; 5 Bing. 196; Tidd, 9th edit. 966, 973.

(d) *Quære*, if this averment between brackets be necessary.

(e) See the pleadings in *Ellison* v. *Iles*, 11 A. & E. 655; 3 P. & D. 391; where, under the facts stated, it was held that the defendant instead of this plea to the new assignment should have pleaded another right of way.

2. Replications.

Replications.

Similiter to general issue to new assignment.

And the plaintiff, as to the plea of the defendant by him [first] above pleaded to the said trespasses above newly assigned, and whereof he hath put himself upon the country, doth the like.

Commencement of replication to a special plea to a new assignment.

And the plaintiff, as to the said plea of the said defendant by him [secondly] above pleaded as to the said trespasses above newly assigned, saith, that &c.

Conclusion with a verification.

And this the plaintiff is ready to verify, &c.

XXXVII. PLEAS OF DEFENCES PENDING SUIT.

Plea in banc, and before return of the *venire*, of a release, &c. *not* at the assizes. (*a*)

In the Queen's Bench.

On the —— day of ——, A. D. ——. (*b*)

C. D. ats. A. B. } And now at this day, that is to say, on ——, the —— day of ——, A. D. ——, comes the defendant, by his attorney aforesaid, and saith, that the plaintiff ought not *further* (*c*) to maintain his aforesaid action thereof against him, because he saith that after the pleading of the last pleading in this suit, that is to say, after ——, the —— day of ——, A. D. ——, on which day the plaintiff [*or* "defendant"] pleaded his said plea [*or* "replication," *or* "rejoinder,"] and before this day, and within eight days now last past, to wit, on &c. the plaintiff [*here state the release, as ante, 113, or other subject-matter of the plea.*] And this the defendant is ready to verify; wherefore he prays judgment, if the plaintiff ought *further* to maintain his aforesaid action thereof against him, &c. [*Annex affidavit of truth, as ante, 5.*

The like at the assizes. (*d*)

On the —— day of ——, A. D. ——.

And now at this day, to wit, on the —— day of ——, A. D. ——, before —— and ——, justices of our said lady the now queen, appointed to take the assizes in and for the county of —— aforesaid, at ——, in the same county, comes the defendant by G. H., Esq., his counsel, and saith, that the plaintiff ought not *further* (*c*) to maintain his aforesaid action against the defendant, because he saith, that after the making of the said several alleged promises, [*or* "after the accruing of the said several alleged causes of action,"] in the said declaration mentioned, and after the pleading of the last pleading in this suit, that is to say, after the —— day of ——, [*the return day of the* venire facias] last past, (from which day until the —— day of ——, in —— Term next, unless the justices of our lady the queen assigned to hold the assizes of our said lady the queen in and for the said county of —— should first come, on the —— day of ——, in the said county of ——, the action aforesaid is continued,) and before this day, and within eight days thereof, to wit, on &c. the plaintiff, by his certain writing of release, sealed with his seal, dated &c. did release &c. [*State the profert and the particular matters released, as ante, 113, and conclude as follows:*]

(*a*) As to this plea in general, see *ante*, vol. i. Index, "*Puis Darrein Continuance*;" Bul. N. P. 309; Selw. N. P. 118; Com. Dig. Abatement, H. 32; I. 24. And when it is not necessary to plead specially matter of defence arising since the commencement of the suit, see 9 East, 82; and forms referred to, 10 Wentw. xcii.; 2 Rich. C. P. 22. The plea may, it seems, be put in at *Nisi Prius* on paper; Ry. & Moo. C. N. P. 404.

(*b*) As to the title, see 3 T. R. 554.

(*c*) This seems necessary, see 4 East, 507.

(*d*) If the plea contain matter in abatement, it must conclude by "*praying judgment of the writ, and that the same may be quashed*," &c. as in other pleas in abatement.

And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his said action thereof against him, &c. [*Annex affidavit of truth, as ante, 5.*

On the —— day of —— A.D. ——.

Plea in banc by an executor, of judgment recovered against him by another creditor pending action. (*e*)

And now at this day, that is to say, on &c. [*proceed to state the continuance as in the preceding form,*] comes the defendant, by C. D. his attorney aforesaid, and saith that the plaintiff ought not further to maintain his aforesaid action thereof against him. Because he says, that S. N. after the death of the said testator, to wit, on the —— day of ——, A.D. ——, by a certain writ of our lady the queen, called a writ of summons, had impleaded the defendant as executor as aforesaid, in the Court of our said lady the queen, before the queen herself, at Westminster, in the county of Middlesex, in an action [of debt for sum of £—— for money borrowed by the testator from the said S. N. in his lifetime, and due and owing at the time of his death,] and that such proceedings were thereupon had in the said Court of our lady the queen in the said plea, that the said S. N. afterwards, and after the pleading of the last pleading in this suit, that is to say, after the —— day of ——, A.D. ——, on which day the plaintiff pleaded his said replication, and before this day, and within eight days now last past, to wit, on &c. by the consideration and judgment of the said Court, recovered in the said plea against the defendant as executor as aforesaid, her said debt of £—— and also [80*s.*] which by the same Court were adjudged to the said S. N. for her damages which she had sustained, as well on occasion of the detaining of that debt, as for the costs and charges by her about her suit in that behalf expended, whereof the defendant was convicted, as by the record and proceedings thereof remaining in the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid, will more fully appear; which said judgment, so had and obtained as aforesaid, still remains in full force and effect, not in anywise reversed, annulled, discharged or satisfied. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought *further* to maintain his aforesaid action thereof against him &c. [*Annex affidavit of truth, as ante, 5.*

On the —— day of ——, A.D. ——.

Plea at Nisi Prius of a judgment recovered in assumpsit against defendant as executor.

C. D. executor, &c. ats. A. B. } And now at this day, to wit, on the 16th day of October, in the —— year of the reign of our sovereign lady Victoria, to which day the sittings at Nisi Prius, which began on the 11th day of October, in the year aforesaid, was in due manner continued before the Right Honourable Thomas Lord Denman, the Chief Justice of our said lady the queen, assigned to hold pleas before the queen herself, comes the defendant, by T. P. his counsel, and saith, that the plaintiff ought not further to maintain his aforesaid action against the defendant, because he saith, that one J. P., after the death of the said R. H., to wit, on &c. by a certain writ of our lady the queen, called a writ of summons, impleaded the defendant, as executor as aforesaid, in the Court of our said lady the queen, before the queen herself here, in a certain action on promises made by the said R. H. in his lifetime to the said J. P.,

(*e*) See 5 Taunt. 333, 655; 3 B. & C. 317.

PLEAS OF DEFENCES PENDING SUIT.

to the damage of the said J. P. of [£67 : 7*s.* 7*d.*]; and such proceedings were thereupon had in the said Court of our said lady the queen, before the queen herself here, in that plea, that the said J. P. according to the course and practice of the same Court, afterwards, and after the pleading of the last pleading in this suit, that is to say, after the —— day of ——, A.D. ——, on which day the plaintiff pleaded his said *replication*, and before this day, and within eight days now last past, to wit, on &c. the said J. P. duly obtained a certain judgment of the said Court against the defendant, as executor as aforesaid, whereby it was considered by the said Court, that the said J. P. should recover against the defendant, as executor as aforesaid in that plea, [£71 : 7*s.* 7*d.*] for the damages which he had sustained as well by reason of the not performing the said promise last mentioned, as for his costs and charges by him about his suit in that behalf expended, whereof the defendant was convicted, as by the record and proceedings thereof, still remaining in the said Court of our said lady the queen, before the queen herself here, more fully appears; which said judgment still remains in full force and effect, not in anywise annulled, discharged or satisfied; and the defendant further saith, that he hath fully administered all and singular the goods and chattels which were of the said R. H. at the time of his death, which have ever come to his hands to be administered, except goods and chattels of small value, to wit, of the value of [£20 : 6*s.* 8*d.*] and that the defendant hath not, nor at the time of the commencement of this suit, nor at any time since, had any goods or chattels which were of the said R. H. at the time of his death, in his the defendant's hands to be administered, except goods and chattels to the value of [£20 : 6*s.* 8*d.*] and no more, which are not sufficient to satisfy the damages so recovered by and due and owing upon the said judgment as aforesaid, and which are subject and liable to satisfy the said damages. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his said action against him, &c.

Affidavit of the truth of such plea.

In the Queen's Bench.

Between { A. B. . . . . plaintiff, and C. D., executor, &c. . defendant.

C. D. of —— Strand, in the county of ——, merchant, the above-named defendant, maketh oath and saith, that the judgment mentioned in the plea of the defendant by him pleaded since the pleading of the last pleading in this suit, and hereunto annexed, was signed and obtained by J. P. therein named against this deponent on the 11th day of June, 1830, and was so signed and obtained for a debt justly due and owing from the above-named R. H. to the said J. P. in the lifetime of the said R. H. and at the time of his death; and that the said debt, at the time the said judgment was so signed as aforesaid, was and is still due and unpaid; and this deponent further says, that the said plea hereunto annexed is true in substance and in fact, and that the matter thereof arose within eight days next before the —— day of —— on which the said plea was pleaded.

Sworn at Westminster Hall, the —— of ——, 1836, before me. (Signed) *Denman.*

(Signed) C. D.

On the —— day of ——, A.D. ——.

C. D. ats. A. B. } And now at this day, to wit, on the —— day of —— [*the day of trial*] in the —— year of the reign of our sovereign lady Victoria, at the sittings of Nisi Prius, holden at the Guildhall of the city of London, in and for the said city of London, before the Right Honourable Thomas Lord Denman, her majesty's chief justice assigned to hold pleas in the Court of our said lady the queen, before the queen herself, comes the defendant, by —— Esq. his counsel, and saith, that the plaintiff ought not further to maintain his action against the defendant, because he saith, that after the said several alleged causes of action in the said declaration mentioned accrued to the plaintiff, and after the (*h*) —— day of —— last past, until (*i*) —— next after —— in [Easter] Term next, unless the said Right Honourable Thomas Lord Denman, her majesty's chief justice assigned to hold pleas in the Court of our said lady the queen, before the queen herself, should first come, on the (*k*) —— day of —— at the Guildhall of the city of London, the said action is continued, to wit, on the —— day of —— in the year of our Lord ——, and within eight days now last past, the plaintiff, by his certain writing of release, sealed with his seal, and which the defendant now brings here into Court, the date whereof is the day and year last aforesaid, did remise, release and for ever quit claim unto the defendant, his heirs, executors and administrators, all and all manner of action and actions, cause and causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and in equity, or otherwise howsoever, which he the plaintiff then had, or which he should or might at any time or times thereafter have, claim, allege or demand against the defendant, for or by reason or means of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release, as by the said deed or writing of release, reference being thereunto had, will fully appear. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action thereof against him, &c.

Plea, at the sittings after Term at Guildhall, of a release pending action. (*g*)

And now at this day, that is to say, on &c. until which day the trial of the said action was adjourned by the Right Honourable Thomas Lord Denman, her majesty's chief justice &c. comes the defendant &c. [*alleging the fact to have happened in the usual way, and as in the preceding form, after the return of the venire,*] from which day until the day in banc, unless the chief justice should first come &c. the action is continued, &c.

Plea at the sittings *before* term, adjourned from the sittings *after*.

On the —— day of ——, A. D. ——.

C. D. ats. A. B. } And now at this day, to wit, on &c. in the —— year of the reign of our sovereign lady the queen, at the sittings of nisi prius holden at the Guildhall of the city of London, in and for the said city of London, before the Right Honourable Sir Nicholas Conyngham Tindal,

Plea in the Common Pleas of defendant's bankruptcy and certificate *puis darrein continuance* at Guildhall. (*l*)

(*g*) See the form, *ante*, 1162; 2 Rich. C. P. 22; 10 Wentw. Index, xcii.

(*h*) The return day of the *venire facias*; see Bul. N. P. 310.

(*i*) Return of *distringas*.

(*k*) Day of trial.

(*l*) See 15 East, 623, 624; 6 B. & C. 623.

PLEAS OF DEFENCES PENDING SUIT.

Knight, her majesty's chief justice assigned to hold pleas in her majesty's Court of the Bench, by force of the statute in such case made and provided, comes the defendant by his counsel J. W. Esq. Serjeant at Law, and says, that the plaintiff ought not further to maintain his aforesaid action thereof against the defendant, because &c. [*state the trading of defendant, petitioning creditor's debt, act of bankruptcy, fiat issued, and defendant's being found bankrupt, notice in London Gazette, defendant's surrender and examination, defendant's conformity, and allowance of certificate according to the facts, see ante, 78 to 80, and then proceed as follows:*] And the defendant in fact further saith, that the said certificate, having been so signed and allowed as aforesaid, afterwards and since the last continuance of the plea aforesaid, that is to say, after the —— day of —— in the year last past, from which day until the —— [2d of November] in Michaelmas Term next, unless the said Right Honourable Sir Nicholas Conyngham Tindal, knight, her majesty's chief justice assigned to hold pleas in the said Court of the Bench aforesaid, should first come on the —— day of ——, in the year of our Lord —— aforesaid, at the Guildhall of the city of London, the action aforesaid was continued, (*m*) and before this day and within eight days now last past, to wit, on the day &c. last aforesaid [*state the confirmation, see ante, 80*]. And the defendant further saith, that the said several causes of action in the said declaration mentioned accrued, and each and every of them did accrue, to the plaintiff before the defendant so became a bankrupt as aforesaid. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action thereof against him the said defendant.

Plaintiff's discharge under Insolvent Act after issue joined.

In the Queen's Bench.

On —— day of —— A. D. ——.

C. D. ats. A. B. } And now at this day, to wit, on the —— day of ——, in this same term, until which day the plea aforesaid was last continued, come as well the plaintiff as the defendant by their respective attornies aforesaid. And the defendant says, that the plaintiff ought not further to maintain his aforesaid action thereof against the defendant, because he says, that after the alleged debts, [*or if the action be in assumpsit, alter this form accordingly throughout,*] and said several causes of action, and each of them in the said declaration mentioned accrued to the plaintiff, to wit, on &c. [*set out the proceedings according to the facts; see form, ante, 73, where the proceedings are fully set forth.*] And the defendant further says, that by force of the said appointment, and within eight days now last past, all the estate, right, title, trust and interest of the plaintiff of, in and unto the said alleged debts and causes of action in the said declaration mentioned, and all the real and personal estate and effects of the plaintiff, became and were and now are vested in the said C. M. as such assignee as aforesaid. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action thereof against him, &c.

[*Signature of counsel.*]

Plea of release pleaded at the assizes.

On the —— day of ——, A. D. ——.

T. C. agt. R. S. } And now at this day, that is to say, on [Wednesday] the [22d] of [July] in the year of our Lord [1836] before —— and ——, justices of our lady the now queen, appointed to take the assizes in

(*m*) Continuances are now abolished.

and for the county of —— aforesaid, at —— in the same county, comes the defendant by C. P. Esq. his counsel, and says, that the plaintiff ought not further to maintain this action against the said defendant, because he says, that after ——, the —— day of —— in Trinity term last past, from which day until —— the 2d day of November in Michaelmas term next, (unless the justices of our lady the queen assigned to hold the assizes of our lady the queen in and for the county of [Hereford] should first come on [Wednesday] the [22d] day of [July] in the year of our Lord [1836] at [Hereford] in the said county of [Hereford] the action aforesaid was continued, (*n*) and before this day and within eight days now last past, to wit, on the 18th day of July, in the year of our Lord 1836, the plaintiff by his deed bearing date the same day and year last aforesaid did demise, release and for ever quit claim unto the defendant, his heirs, executors and administrators, all and all manner of action and actions, cause and causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both in law or equity, and otherwise howsoever, which against the defendant he the plaintiff then had or ever had, and which he the plaintiff, his heirs, executors or administrators, should or might thereafter have, claim, challenge or demand for or by reason or means of any matter, cause or thing whatsoever from the beginning of the world until the day of the date thereof. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain this action against him, &c. C. P.

Affidavit of the truth of plea *puis darrein continuance.*

Between { R. S. . . . plaintiff, and T. C. . . . defendant.

T. C. of the parish of ——, in the liberties of the city of ——, the above-named defendant, maketh oath and saith, that the plea hereunto annexed is true in substance and matter of fact, and that the matter thereof arose within eight days before this day. T. C.

Sworn in Court the —— day of ——
before me, N. C.

In the Queen's Bench.

On the —— day of ——, A. D. ——.

Replication in banc to plea of release *puis darrein continuance* that the release was obtained by fraud.

R. v. T. } And the plaintiff, as to the said plea of the defendant by him above pleaded, saith, that he ought not to be barred from further maintaining his aforesaid action thereof against the defendant, because he saith, that the said alleged writing of release in the said plea mentioned was had and obtained from the plaintiff by the fraud and covin of the defendant. And this the plaintiff is ready to verify; wherefore he prays judgment and his damages by him sustained on occasion of the non-performance of the said several promises in the said declaration mentioned to be adjudged to him, &c.

(*n*) See note in last page.

XXXVIII. DEMURRERS.—I. IN GENERAL.

In General.

Practice Rules, Reg. Gen. Hil. Term, 4 W. 4.

Demurrer to be delivered, not filed.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be *filed* with any officer of the Court, but the same shall always be *delivered* between the parties.

Points to be stated before demurrer signed.

2. In the *margin* of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a judge, and leave may be given to sign judgment as for want of a plea.

Other points not stated may be argued.

Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way.

No rule to join in demurrer.

3. No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand, to deliver the same, otherwise judgment.

Joinder in demurrer need not be signed.

4. To a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

Making up issue and demurrer.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney, or agent, as the case may be, and not, as heretofore, by any officer of the Court.

Setting down special case and demurrer.

6. No motion, or rule for a concilium, shall be required, but demurrers, as well as all special cases and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas, upon payment of a fee of one shilling, and notice thereof shall be given forthwith by such party to the opposite party.

Delivery of paper books.

7. Four clear days before the day appointed for argument the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench, or the Common Pleas, or Lord Chief Baron, as the case may be, and the senior judge of the Court in which the action is brought, and the defendant shall deliver copies to the other two judges of the Court next in seniority; and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

Pleading Rules, Hil. Term, 4 W. 4.

14. The form of a demurrer shall be as follows: "The said defendant, by —— his attorney, [*or* "in person, &c." *or* "plaintiff,"] says, that the declaration [*or* "plea, &c."] is not sufficient in law," *showing the special causes of demurrer, if any.* Form of demurrer.

The form of a joinder in demurrer shall be as follows: "The said plaintiff [*or* "defendant"] says, that the declaration [*or* "plea, &c."] is sufficient in law. Joinder in demurrer.

Observations.]—As these recent rules prescribe *one uniform precedent* for a demurrer or joinder, whatever may be the form of action, it will be observed, that the ancient variations in the commencements and conclusions of demurrers and joinders are now abolished.

XXXVIII. DEMURRERS.—II. TO DECLARATIONS.

To Declarations.

Prescribed form of demurrer to declaration.

In the Q. B. [*or* "C. P." *or* "Exchequer."]

The —— day of ——, A. D. ——.

In Margin. "The defendant [*or* "plaintiff"] intends to argue that [*here state some one matter of law intended to be argued.*]" (*a*)

D. ats. B. } The defendant, by —— his attorney, [*or* "in person," &c. *or* "plaintiff,"] says, that the declaration [*or* "plea," &c.] is not sufficient in law.

In case of a special demurrer, proceed in the above form, and add:] And the defendant [*or* "the plaintiff,"] according to the form of the statute in such case made and provided, states and shows to the Court here the following causes of demurrer to the said declaration, [*or* "first count of the said declaration," *or* "plea," &c.] that is to say, that [*here state the particular causes, and conclude thus:*] And also that the declaration [*or* "first count," *or* "plea,"] is in other respects uncertain, informal, and insufficient, &c.

Special demurrer for that declaration contains repugnant promises, &c.

For that the said declaration contains two distinct promises alleged to have been made by the defendant to the plaintiff, altogether repugnant to and inconsistent with each other, and also for that the said first count contains two several promises, alleged to have been made by the defendant to the plaintiff, founded on certain supposed considerations and liabilities in that count alleged, inconsistent with those promises, and also for that the said declaration is in other respects uncertain, informal, and insufficient, &c.

For being too general, and not stating a sufficient cause of action; also because there are divers blanks and material omissions in the declaration.

That there is not in all or any of the counts of the said declaration any cause of action shown or stated by or for the plaintiff to maintain his aforesaid action against the defendant, inasmuch as in the said declaration the number of miles which the said horses in the said counts respectively mentioned were hired or let out to draw the said several carriages or hearses in those counts respectively mentioned, is not stated, alleged or specified in any of the counts of the said declaration, nor are the places from and to which the said horses were to draw the carriages or hearses, or any of them, specified; and for that there is no specific offence charged against the defendant in any of the counts of the said declaration, and for that there are divers blanks left in each and every count of the said declaration, and there are divers omissions of material statements and averments, namely, of places,

(*a*) Where the demurrer is general, the marginal note must specify the points intended to be relied on in argument; but where the demurrer is special, and the points are specified in the body of the demurrer, the marginal note need only refer to the points for argument, as in the following form: "The points of law intended to be argued are those specified in the body of this demurrer." The marginal note in the demurrer book of the points to be argued is for the information of the Court, and not for that of the parties; and a party whose pleadings are demurred to may attack the pleadings of the other side, although he has not set down the points on which he intends to object; *Scott v. Chappelow*, 4 M. & Gr. 336.

times and distances in each and every count of the said declaration; and for that the said declaration is uncertain, defective and informal, &c.

For that it does not appear in or by the said declaration on what day or in what month the defendant made the said several promises therein mentioned, or any of them; and also that there are divers blanks and void spaces in the said declaration which render the sense thereof uncertain and obscure, &c.

For not stating a time when the promises were made, and because there are blanks left in the declaration.

For that in and by the said declaration in the first count thereof, the plaintiff hath declared and complained against the defendant in an action on the case for a certain alleged wrongful conversion and disposal of the said spaniel and setting-dog therein mentioned of the plaintiff to the use of him the defendant, and yet in the second and last counts of the said declaration, the plaintiff hath declared against the defendant in the above suit in an action on promises for the alleged breaches of express or implied promises in not returning and re-delivering certain spaniels therein respectively mentioned, alleged to be lent and delivered by the plaintiff to the defendant, and not for any alleged wrongful conversion and disposal thereof; and also for that there are in the said declaration alleged causes of action, different in their natures, comprehended and included in the said declaration, to wit, a pretended cause of action founded on an alleged wrongful conversion and disposal of a spaniel and setting-dog of the plaintiff, and alleged causes of action, grounded on promises which are incompatible with each other, and ought not to be joined in the same declaration; and also for that causes of action, founded on alleged wilful wrongs and injuries, ought not and cannot be blended and included in one and the same declaration with causes of action founded on promises or contracts; and also, &c.

To a declaration for a misjoinder of counts in trover and assumpsit. (*c*)

For that it is not stated in or by the said declaration, that administration with the will annexed of all and singular the goods and chattels, rights, and credits, which were of the said E. G. deceased, at the time of his death, was in due form of law committed to the plaintiff after the decease of him the said E. G. but in lieu thereof there is the following allegation in the said declaration, that is to say, "To which said J. P. (the plaintiff) administrator of all and singular the goods, chattels, rights and credits, which were of the said E. G. deceased, at the time of his death, was by John, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, after the decease of the said E. G. to wit, on &c. aforesaid, in due form of law committed," &c.

To a declaration at the suit of administratrix with the will annexed, for not showing that proper letters of administration were granted to her. (*d*)

For that it is stated and alleged in and by the said first count of the said declaration, that the defendant promised the plaintiff to pay to him the said sum of money in that count mentioned whenever afterwards he the plaintiff

To the first count in assumpsit for laying the promise to pay whenever *plaintiff* should be requested, and to second count for laying the undertaking

(*c*) The declaration was held sufficient; but the cause of demurrer affords a useful precedent. The defendant must demur to the whole declaration for misjoinder, and not to any particular count; 1 M. & Sel. 355.

(*d*) The declaration stated that "J. H. late of, &c. was summoned to answer J. P. administrator with the will annexed," &c.; but which latter words were omitted in the breach, where the granting of letters of administration is stated, which was the cause of demurrer.

To Declarations.

to pay in consideration of work done by *defendant*.

should be thereunto requested; and also for that the alleged promise in the said second count of the said declaration mentioned is thereby stated and alleged to have been made in consideration that the defendant had done, performed and bestowed, by himself and his servants, the said work and labour in that count mentioned. And also, &c.

To second, third, and last counts of declaration for laying the promises on an impossible day.

For that the several promises in the said second, third, and last counts of the said declaration mentioned are, and each and every of them is, laid and alleged to have been made on the 31st day of November, in the year of our Lord 1830, when there was no such day, and it was therefore impossible that such last-mentioned promises or any of them should have been made thereon.

Demurrer for not making a profert of a deed. (*e*)

For that the plaintiff hath not brought the said alleged deed of release into Court, or made any profert thereof, and because the defendant, in the manner the said alleged deed of release is above pleaded, cannot have oyer of the same, so that she might know whether it is or is not the deed of the defendant, and because it doth not appear by the plea whether the said alleged deed of release is actually destroyed, or whether it doth not still exist, and is only lost or mislaid.

For not describing the *locus in quo* in a declaration in replevin.

For that it is not alleged, nor does it appear by the said declaration of the plaintiff, when, or in what particular place or places in the said parish in the said declaration mentioned, the goods and chattels in the said declaration mentioned, or any part thereof, were taken, whereby the defendant is prevented from making a proper defence to the said declaration, and for want of naming or mentioning in the said declaration the place or places where the said goods and chattels, or any part thereof, are above alleged to have been taken, the defendant is prevented from taking any issue upon the place of taking, &c.

For not properly describing the *locus in quo*, and for not specifying the number or kind of cattle, &c. distrained.

For that the plaintiff hath not, in and by his said declaration, alleged or shown in what particular place or places within the parish of —— the defendant took the said goods and chattels in the said declaration mentioned, or any part thereof, nor hath specified or shown in his said declaration the number or kind of cattle by the said declaration alleged to have been taken by the defendant; by means whereof the plaintiff hath endeavoured to prevent the defendant from making a proper defence to the said declaration, &c.

Demurrer to declaration in trespass for stating trespasses by way of recital, and for omitting *vi et armis* and *contrá pacem*. (*f*)

For that the plaintiff by his said declaration complained against the defendant as if the alleged cause of action in the said declaration mentioned had been a mere consequential injury, whereas it appears to have been an immediate and direct trespass committed by the defendant to the property of the plaintiff; and for that the plaintiff hath complained against the defendant in an action on the case, whereas the declaration ought to have been in an action of trespass *vi et armis;* and for that the defendant was not, by the said declaration, positively charged with any of the facts therein contained,

(*e*) See 3 T. R. 151.

(*f*) See a similar form, 5 T. R. 648.

and the same were only stated by way of recital, whereas they ought to have been positively averred to have happened; and also that it is not alleged that the supposed trespass was committed with force and arms, nor against the peace, &c.

To declaration, first, for declaring against defendants as assignees; secondly, for beginning the declaration "For that whereas," it being in trespass; fourthly, for being too general, words badly spelt, &c.

That the plaintiff hath declared against the defendants as assignees of E. F. a bankrupt, whereas if they are liable at all, they are liable on their own personal liability, and not as assignees as aforesaid; and for that the said alleged trespasses in the said first count of the said declaration mentioned are not charged directly, expressly or positively, but the same are only stated and set forth by way of recital and inducement; and also for that in the said third and last counts of the said declaration there are certain words which are wholly unintelligible, and the words "twelve other different articles *do* & curtins," are uncertain and unintelligible; and for that the said declaration is in other respects informal, uncertain and defective, &c.

For stating an assault to have been committed on divers days and times. (*g*)

For that the plaintiffs have, in and by the said [first count of the said] declaration, complained against the defendants of and for a personal trespass therein and thereby alleged to have been committed by the defendants on &c. and to have been from thence continued on divers days and times from and between that day and the day of the commencement of the said suit, when by law they ought to have declared against the defendants for the said trespass, if any hath been committed, as having been committed on some certain or stated day, and to have confined and limited the said trespass to that day in particular, and not have continued the same from time to time, and in manner and form as in the said first count is above set forth; and also for that the defendants cannot either deny, plead to, or justify the matters contained in the said [first count of the said] declaration, as in the said [first count of the said] declaration is pleaded and set forth; and also for that the said [first count of the said] declaration is in other respects uncertain, &c.

Demurrer to declaration in *trespass quare clausum fregit*, that neither name nor abuttals are stated. (*h*)

For that the said close [*or* "closes"] in which &c. in the declaration mentioned, is not designated or described in the said declaration either by name or abuttals or other description; and also for that it does not appear in or by the said declaration where or in what parish or part of the said county the said close in which &c. was or is situate.

Demurrer books, judgments on demurrer, &c.

For forms of demurrer books, judgments on demurrers, &c. see Chitty's Forms.

(*g*) See 6 East, 391, 395.

(*h*) The Reg. Gen. Hil. T. 4 W. 4, *In Trespass*, orders "in actions of trespass *quare clausum fregit*, the close or place in which &c. must be designated in the declaration by name or abuttals, or other description, in failure whereof the defendant may demur specially."

XXXVIII. DEMURRERS.—III. TO PLEAS IN ABATEMENT.

To Pleas in Abatement.

General demurrer to a plea in *abatement*. (*a*)

In the Queen's Bench [*or* "Common Pleas," or "Exchequer."]
On the —— day of ——, A. D. ——.

And the plaintiff saith, that the said plea of the defendant is not sufficient in law, and that he the plaintiff is not bound by the law of the land to answer the same. And this he is ready to verify; wherefore for want of a sufficient plea in this behalf the plaintiff prays judgment that his said writ may be adjudged good, and that the defendant may answer further [*or* "over"] to the said declaration. (*b*)

Margin as ante, 534.

Special demurrer to plea in abatement. (*c*)

Same as the above form to the end, and then proceed as follows:] And the plaintiff states and shows to the Court here the following causes of demurrer to the said plea, that is to say, that &c. [*here set out the causes, and conclude as follows:*] And also for that the said plea is in other respects uncertain, informal and insufficient, &c.

To plea in abatement for beginning "And the said A. W." when there is no such person named in the declaration, whereas it should have been stated thus, "and A. W. sued by the name," &c. (*d*)

For that it appears in, by and from the said declaration, that the plaintiff hath brought his action against H. F., and no such person as A. W. is mentioned in the said declaration, and yet the said plea begins with these words, "And the said A. W." which is wholly repugnant to the said declaration; and for that the said plea is not any answer to the said declaration, and is wholly uncertain &c.

That plea is pleaded in abatement of whole demand, but does not affect any part thereof. (*e*)

That the plea, although pleaded in abatement of the whole demand of the plaintiff, did not apply to the whole of the money above demanded by him, that it did not extend to both the causes of action above specified, but only to one of them, and that the defendant had not pleaded in abatement of the declaration or count of the plaintiff, but in abatement of his writ merely, and had nevertheless relied upon matter appearing only in the declaration or count without showing any defect in the writ.

(*a*) As to the form of this demurrer and the joinder thereto, see 2 Saund. 210 b, *f*, *g*, n. 2; 211, n. 3; 10 Wentw. Index. xxvi.; and see *infra*; see forms, 1 Lil. Ent. 4, 12; Pl. A. 306. If the demurrer be special, the introduction to the causes of demurrer will be the same as in the above special demurrer to a plea in *bar*. The terms of the rule H. T. 4 W. 4, reg. 14 and 15, prescribing the form of demurrer and joinder are general, and seem to apply as well to demurrers to pleas in *abatement* as to pleas in *bar*, see *ante*, 533.

(*b*) A demurrer concluding in bar with a prayer of damages is improper.

(*c*) A demurrer to a plea in abatement need not ever assign causes of demurrer, 2 M. & S. 485. A *joinder* in demurrer to a replication to a plea in abatement must not conclude as in bar, but may pray that the defendant answer over; 1 Wils. 302; *Bowen* v. *Shapcott*, 1 East, 542; 2 Saund. 216 e, f.

(*d*) See 3 Wils. 514.

(*e*) See form in *Herries* v. *Jamieson*, 5 T. R. 553.

XXXVIII. DEMURRERS.—IV. TO PLEAS IN BAR.

See the forms prescribed by Reg. Gen. H. T. 4 W. 4, *ante*, 533.

To Pleas in Bar.

For that the defendant hath not concluded his said plea by putting himself upon the country, &c.

For not concluding to the country.

That the said matters pleaded in the said plea as to the sufficiency of the affidavit of the cause of action as required by the statutes in such case to be made and filed in this Court, is a matter of law for the decision of the Court, and not for the jury; and such matters should not be left to a jury; and the said plea should have been framed so as to have referred the matters therein stated to the Court; and also for that the said plea consists altogether of matter of law; and also for that the matters pleaded in the said plea by way of defence cannot be so pleaded; and also for that the said plea has no conclusion whatever either to the country or with a verification, and has no proper conclusion.

For not having any conclusion with verification or to country, and for not concluding to the Court. (*a*)

For that it was not averred, nor doth it appear in or by the plea how or under what circumstances, or for what purpose, the note was made, and also that the plea ought to have stated and shown affirmatively how there was no consideration or value for the said Earl's making the said note, and also for that the said plea is too general, and also for that as the note must be taken and presumed in law to have been made for value and consideration, and as no fresh facts were stated in the plea, the plea ought to have concluded to the country, and not with a verification.

To a plea in assumpsit of no consideration for note, demurrer that the denial of the consideration is too general, and should have stated affirmatively the particular defect or want of consideration. (*b*)

That it was not averred, nor doth it appear in and by the said plea how or under what circumstances, or for what purpose, the said note was made, and also that the said plea ought to have stated and shown affirmatively how there was no consideration or value for the said Earl's making the said note, and also for that the said plea is too general, and also for that as the note must be taken and presumed in law to have been made for value and consideration, and as no fresh facts were stated in the plea, the plea ought to have concluded to the country, and not with a verification.

Demurrer nearly similar. (*c*)

That the defendant has not by his plea traversed or denied or attempted to put in issue any matter of fact alleged by the plaintiffs, but has introduced and attempted to put in issue matters of fact not alleged nor necessary to be

Demurrer to two pleas to a special action on the case for non-perform-

(*a*) See form, *Knowles* v. *Stevens*, 1 Crom. M. & Ros. 27.

(*b*) See form in 2 Crom. M. & Ros. 72.

(*c*) See form in *Stoughton* v. *Earl of Kilmorey*; 2 Crom. M. & Ros. 72.

To Pleas in Bar.

alleged; and that the plea is no answer to the said first count, but evasive and argumentative, &c.

ance of an agreement. (*d*) Demurrer to a plea of never indebted pleaded to an action of assumpsit.

For that the defendant hath not in or by his said plea confessed and avoided, or traversed and denied, the making of the several promises in the said declaration mentioned; and also for that the said plea is inartificially pleaded, and in other respects uncertain, &c.

That the plea amounts to the general issue, and for putting in issue matter of right, and for not stating a request to plaintiff to assign proper wood, &c. (*e*)

That the said plea amounts to the general issue; and for that the defendant in and by his said plea hath attempted to put in issue to be tried by a jury a matter of right, that is to say, what sort of wood the defendant had a right to cut or take for the making, maintaining and supporting of the said fences in the said plea mentioned; and for that the defendant hath not in his said plea set forth what sort of wood he the defendant had a right to cut or take for the purpose in the said plea mentioned; and for that he hath not in his said plea set forth that no such sort of wood was on the said premises, nor hath he set forth what the custom of the country is with respect to the making, maintaining and supporting of the said fences in the said plea mentioned, or any custom relating thereto; and for that the defendant hath not set forth in his said plea any request to the plaintiff to assign proper wood for the purpose in the said plea mentioned; and for that the said plea is in other respects multifarious, defective, &c.

To a plea in assumpsit on a promissory note where defendant pleaded *non assumpsit infra sex annos*, instead of *actio non accrevit infra sex annos*.

That although the said cause of action in the said first count of the said declaration mentioned did not accrue upon the making of the said promise in that count mentioned, yet nevertheless the defendant hath pleaded that he did not promise within six years next before the commencement of this suit, instead of pleading that the said cause of action of the plaintiffs did not accrue to them within that time; and also, &c.

The like in another form.

That although the said causes of action in the said first, second and third counts mentioned did not arise or accrue upon the making of the promises in those counts mentioned, but on contingencies and on the happening of events which occurred after the making of the said promises; yet the defendant in and by his said plea states, that he the defendant did not at any time within six years next before the commencement of this suit promise in manner and form as the plaintiff hath above thereof complained against him, instead of pleading as to the said first, second and third counts, that the causes of action therein mentioned did not accrue within six years.

For pleading double in the County Court to an action of assumpsit, first, the general issue; secondly, that the cause of action did not accrue within six years before issuing original summons.

For that the said pleas are double, and contain a two-fold answer to the said declaration in this, to wit, that the defendant hath thereby pleaded and alleged that he did not promise in manner and form as the plaintiff hath above thereof complained against him, and also that the several causes of action in the said declaration mentioned did not, nor did any of them, accrue to the plaintiff at any time within six years next before the date of the plaintiff's issuing out his original summons in this behalf, and also, &c.

(*d*) See the form in the case of *Jones* v. *Barkley*, Dougl. 685.

(*e*) See form, vol. xviii. MS. Mr. Justice Ashhurst's Paper Books, 77.

Demurrer to pleas to a declaration in assumpsit (for a wager depending on a foot-race) that the second plea amounts to the general issue, and that there is no matter of fact therein in avoidance of the agreement mentioned in the declaration, and consists wholly of matter of law, on which no issue can be taken; and to another plea *for supposing a fact not set forth in the declaration.*

For that the said last-mentioned plea amounts to the general issue, and tends to great and unnecessary prolixity of pleading; and also for that the defendant hath not in or by his said last plea alleged or shown any matter of fact in avoidance of the said agreement, or the said promise of the defendant in the said first count of the said declaration mentioned, but that the said last-mentioned plea consists altogether of matter of law, upon which no apt or material issue can be taken &c. And as to the said plea of the defendant by him thirdly above pleaded as to the said second count of the said declaration, and the said promise in that count mentioned, the plaintiff saith [*same as demurrer to the above plea. Demurrer to fourth plea the same as that to the second to the end, and then proceed:*] And also for that the defendant hath in and by his said last-mentioned plea alleged that the several sums of £—— and £—— were and are mentioned in the said count as intended to be respectively paid by the said E. F. and the defendant to the plaintiff in the event in that behalf aforesaid, when in truth and in fact no sum of £—— was or is mentioned in the said count, nor any sum of money whatsoever, &c.

Demurrer to a plea (of non assumpsit, except as to part, and tender of that part) to debt on simple contract.

For that the defendant hath not in or by his said plea confessed and avoided, or traversed and denied that he owes to the plaintiffs the said sum of £—— above demanded, or any part thereof; and also for that the defendant hath in and by each of his said pleas tendered an immaterial issue; and also for that the said pleas, although they profess to be and to contain an answer to the whole of the said declaration, do not in truth contain any answer to the same; and also for that the said pleas are pleaded as if the said declaration had been a declaration on promises, whereas the same is a declaration in debt; and for that the first of the said pleas denies that the defendant did promise instead of denying that the defendant was indebted to the plaintiffs; and for that the second of the said pleas states, that the defendant was ready and willing to pay the said sum of £—— therein mentioned, from the time of making the several promises in the said declaration mentioned, as to the said sum of £——, instead of stating that he was ready and willing from the time of his becoming indebted to the plaintiffs in manner and form as the plaintiffs have in their said declaration complained against him, &c.

For pleading *nil debet* to debt on bond, and for not pleading to the whole of the money demanded by plaintiff in his declaration.

That although the plaintiff in his declaration hath demanded of and from the defendant a sum certain, due to him the plaintiff from the defendant by virtue of a writing obligatory under his seal; yet the defendant hath not in or by his plea denied the said writing obligatory to be his deed, nor in any manner shown himself to be discharged therefrom; and also for that the defendant should have pleaded that the said writing obligatory was not his deed, and not that he never was indebted to the plaintiff in the debt demanded; and also for that although the plaintiff hath demanded the sum of £——, yet the defendant hath only pleaded to the said sum of £—— above demanded, and hath not traversed, denied, confessed or avoided the action of the plaintiff as to the residue of the said sum of £—— and also, &c.

To Pleas in Bar.

Demurrer to a plea of *nul tiel record* in C. B. to a declaration on a judgment recovered in Q. B., and for money borrowed; for not answering first count properly, and the second not at all.

For that the defendants have not in or by their said plea denied that there is any such record of the recovery against them the defendants at the suit of the plaintiff remaining in the said Court of our said lady the queen, before the queen herself, as in and by the said first count of the said declaration is above in that behalf alleged; and also for that the said plea, although it professes to be and to contain an answer to the second count thereof, yet it in truth contains no answer thereto, &c.

To plea (to debt on bond conditioned for performance of certain articles of agreement) for not setting forth the articles of which defendant pleaded general performance; and for that it does not appear but that the articles might contain negative or disjunctive covenants. (*f*)

For that the condition of the said writing obligatory refers to certain articles of agreement to be performed by the defendant, for the performance of which the said writing obligatory is made and conditioned, but the defendants have not in their said plea set forth the said articles of agreement, though they have pleaded performance of the matters therein contained generally, but only so much thereof as is recited in the said condition; and also for that the said articles of agreement, for any thing which appears to the Court, might contain negative or disjunctive covenants to which performance cannot be pleaded generally; and also for that articles of agreement not before the Court, or in any manner set out in the said plea of the defendants or in the record, cannot by law be pleaded against a bond for securing the performances of such articles, &c.

To fourth plea to an action of covenant for being double, and concluding with a verification instead of to the country.

That the said fourth plea is double in this, to wit, that two several and distinct breaches of covenant are thereby pleaded in bar of the said action of the plaintiff; and also that the said fourth plea contains several and distinct matters of defence; and also that the plaintiff cannot take or offer any certain issue upon the said fourth plea; and also that the said fourth plea ought to have concluded to the country, and not with a verification, &c.

For not denying the substantial matter in the breach of covenant, and for offering to put in issue matter not properly issuable.

For that the defendant hath in and by his said plea put in issue a matter of inference from the fact before alleged; and for that the defendant hath in and by his said plea offered to put in issue a matter not properly issuable; and for that the defendant hath not in and by his said plea denied, confessed or avoided the substantial matter in the said breach of covenant above alleged; and for that the said plea is in various other respects informal, &c.

That defendant, whose estate is a particular one, has not shown who were the persons seised in fee.

For that the defendant hath not in or by his said avowry shown or set forth whether any or what person or persons was or were seised in his, her or their demesne as of fee, of and in the said place in which &c. or under whom the defendant became or was seised of and in the said place in which &c. in his demesne as of freehold, for the term of his natural life, nor hath the defendant in or by his said avowry shown or set forth that any grant or conveyance of the said place in which &c. was made to the plaintiff for the term of his natural life, nor how or by what means or out of what estate the aforesaid estate and interest of the plaintiff therein commenced or was derived, as he ought to have done, &c.

(*f*) See 4 East, 342.

For that the defendant hath in his said avowry avowed the taking of the said mare, and yet varies from the declaration of the plaintiff in relation to the place of taking, whereas by the laws of this realm, if the defendant would have denied the place of taking mentioned in the declaration, he should have pleaded the same by way of plea in abatement to the said declaration, and then made a suggestion for having a return of the said mare; and also for that the defendant avows the taking of the said mare upon a possessory title only of the place wherein he alleges the same was taken; and for that the said avowry is no answer to the said declaration, nor does it in any way admit or deny the same; and is pleaded in bar, which is wholly repugnant, &c.

For that the defendant avows taking the mare, but states another *locus in quo*, and avows on a possessory title only; nor is the avowry any answer to the declaration; and for that it is pleaded in bar.

For that by the mode of pleading adopted by the defendant in the said second plea, he the defendant has unduly attempted to confine the plaintiff to one cause of action in respect of the trespasses in the first and last counts of the said declaration mentioned, as to the taking and carrying away the goods and chattels in those counts mentioned, by alleging that those takings and carryings away of those different goods and chattels were not different takings or carryings away of different goods and chattels, but were the same taking and carrying away the same goods and chattels, and not other or different; and also for that the defendant in and by that allegation hath with the rest of the matters alleged in the said second plea, justifying the trespasses in the introductory part of that plea mentioned, therein attempted to put in issue two distinctly material and traversable facts; and also for that the said second plea is double and bad for duplicity; and also for that the second plea is in other respects uncertain, informal and insufficient.

Demurrer to a plea for alleging that the trespasses in two counts are the same. (*g*)

(*g*) That this is objectionable on demurrer, see *Edmonds* v. *Walker*, 2 Chit. Rep. 291; *M'Curdy* v. *Driscoll*, 3 Tyr. 571 to 574.

XXXVIII. DEMURRERS.—V. TO REPLICATIONS.

To Replications.

General demurrer to a *replication.*

In the Q. B. [*or* " C. P." *or* " Exchequer."]

On the —— day of ——, A. D. ——.

The cause of demurrer to the replication to the second plea is that &c. [*here state the objection fully.*]

C. D. ats. A. B. } And the defendant saith, that the said replication of the plaintiff to the said [second] plea of the defendant is not sufficient in law.

Special demurrer to a replication.

The cause of &c. [*same margin as above.*]

Same as above to the end, and then as follows:] And the defendant states and shows to the Court here the following causes of demurrer to the said replication, that is to say, that &c. [*Here state the causes, and conclude thus:*] And also for that the said replication is in other respects uncertain, informal and insufficient, &c.

Demurrer to a plea in bar to a *cognizance.* (*a*)

And the defendant saith, that the said plea in bar of the plaintiff to the said cognizance of him the defendant is not sufficient in law. And this the defendant is ready to verify; wherefore, on account of the insufficiency of the said plea in bar in this behalf, the defendant as before prays judgment and a return of the said cattle, goods and chattels, together with his damages, costs and charges by him in this behalf expended, according to the form of the statute in such case made and provided to be adjudged to him, &c.

To a replication in replevin.

This is the same as to a cognizance, only saying, " replication" *instead of* " cognizance." See Plead. Assist. 474.

Demurrer to a replication, that it contains a traverse in the *conjunctive,* when it should have been in the *disjunctive.* (*b*)

That the plaintiff hath alleged that this action was not brought by him against the defendant for the amount of a bill of fees for the work and labour of the plaintiff by him bestowed as the attorney and solicitor of and for the defendant at law *and* in equity; whereas the plaintiff ought to have alleged that the action was not brought against the defendant for the amount of a bill of fees for the work and labour of the plaintiff by him bestowed as the attorney and solicitor of and for the defendant at law *or* in equity; also that the said replication tends to raise an immaterial issue, inasmuch as if the defendant should join issue thereupon, and should on the trial prove that the bill of fees contained charges for fees at law, though not for any fees, charges or disbursements in equity, such issue must be found for the plaintiff, although it would be manifest the plaintiff had not complied with the statute, and therefore would have no right to maintain his action.

(*a*) See 1 Saund. 349; 8 Wentw. 143; 5 Wentw. 18.

(*b*) See form of pleading and demurrer in *Moore* v. *Boulcott,* 1 Bing. N. C. 323; 5 M. & Scott, 122. But see *Webb* v. *Weatherby,* 1 Bing. N. C. 502; and 1 Hodges, 39, S. C. where it was held that a replication putting in issue *two* facts was unobjectionable.

To Replications.

For that the replication of the plaintiff attempts to put in issue, to be tried by the country, mere inference and matter of law, viz. whether the defendant were or were not duly elected mayor, the same replication admitting all the facts and circumstances attending that election, as alleged in the said plea of the defendant; and also for that the said replication is argumentative, and no certain and sufficient issue can be taken thereon; and that it is also in other respects defective, &c.

For attempting to put in issue matter of law, and because the replication is argumentative; upon which no certain issue can be taken. (c)

For that the plaintiff hath not in or by his said replication taken or tendered any single or material issue out of or upon the said plea of the defendant by him last above pleaded in bar, but hath stated and put in issue in his said replication, that the said bill of exchange in the said first count mentioned was not made and drawn for the corrupt considerations in the said last plea mentioned or either of them, whereas every matter and thing stated in the said second plea in any manner relating to the said sum of £—— in the said plea mentioned, which is one of the matters stated and relied upon as a consideration in the said replication, was merely stated as inducement, and as a matter upon which no issue was intended to be offered or could be taken; and for that the plaintiff hath not in or by his said replication traversed, or in any manner denied by traverse or otherwise, the only material fact contained in the plea of the defendant by him lastly above pleaded in bar, and upon which any material issue could be taken, namely, whether there was any such corrupt contract and agreement for the making and drawing or in respect of the said bill of exchange in the first count mentioned, which he ought to have done; and for that the said replication is double and confused in putting in issue two several and distinct matters, namely, whether the said bill of exchange in the said first count mentioned was given for two illegal considerations, namely, a gambling consideration and an usurious consideration, whereas the only material fact contained in the second plea of the defendant was, whether it was given upon a corrupt and usurious consideration, in pursuance of a corrupt and usurious contract and agreement; and for that the plaintiff hath not in or by his said replication traversed, denied or in any manner put in issue such corrupt contract and agreement, which is the gist and foundation of the defence of the defendant in that respect, inasmuch as that alone could make the said bill of exchange void in law, or bring it within the meaning and intent of the said statute in such case made and provided, &c.

Demurrer to replication to plea in assumpsit for being double, in putting in issue two several and distinct matters.

(c) See 4 East, 21.

XXXVIII. DEMURRERS.—VI. TO REJOINDERS.

To Rejoinders.

For duplicity and being multifarious, in offering two distinct issues upon the replication of the plaintiff. (a)

The Commencement as ante, 538, saying " rejoinder" *instead of* " plea."] That the said rejoinder is double and multifarious in this, that it contains two separate and distinct answers, and offers two separate and distinct issues upon the aforesaid replication of the plaintiff to the said plea of the defendant so by him lastly above pleaded in bar, whereas only one issue could or ought to have been offered or taken upon the said replication or upon the matter therein contained; and that the said rejoinder is also double and informal in this, that it offers to put in issue two distinct and different escapes, whereas the said plaintiff hath originally declared upon, and in his subsequent replication hath supported his said declaration by, only one escape, and that according to the rules of good pleading the said rejoinder should and ought to have been confined to and have concluded with a traverse, which is thereby taken on the said escape so set forth in the said replication of the plaintiff; yet the defendant hath unnecessarily and inartificially extended the said rejoinder to further and other different matter, by way of supposed second answer to the said replication, whereas only one answer could or ought to have been made to, and only one issue offered or taken upon, the said replication, or in or by the said rejoinder; and that the matter so secondly alleged in the said rejoinder is no answer to the said replication, nor direct or positive denial of the escape therein mentioned, but only an argumentative denial of such escape, whereas the said escape should have been expressly and directly traversed and denied by the said rejoinder; and that the said rejoinder is calculated to occasion the trial of two separate issues upon one and the same fact, and also to introduce a vexatious and unnecessary length of pleading in this cause; and that the said rejoinder is repugnant and informal in this, that although to one part thereof it considers the said replication and answers the same as being a replication, yet in another part thereof it considers the said replication as being a new assignment, and professes to answer the same accordingly; and that the said rejoinder is in various other respects repugnant, multifarious, insufficient and informal.

For not tendering an issue on the fact traversed in the replication. (b)

For that the defendants in their rejoinder have not tendered an issue on the fact traversed by the plaintiff in his said replication; and for that the issue tendered in the said rejoinder is too large, comprehending not only the fact of the prescription traversed by the replication, but also a matter of fact not alleged or traversed by the said replication, namely, a prescription to dig for stones &c. in ——; and because the last prescription so attempted to be put in issue is wholly immaterial and irrelevant in this action, &c.

(a) See 1 B. & P. 415. (b) See 4 T. R. 157; and see a form in 2 Dowl. 102, 103.

XXXIX. JOINDERS IN DEMURRER IN GENERAL.

Joinder in demurrer to a declaration or replication. (a)

In the Q. B. [*or* "C. P." *or* "Exchequer."]

On the —— day of ——, A. D. ——.

B. agst. D. } And the plaintiff saith, that the said declaration [*or* "first count" *or* "replication"] is sufficient in law.

Joinder in demurrer to a *plea in bar in replevin.* (b)

And the plaintiff saith, that his said plea in bar to the said cognizance of the defendant is sufficient in law.

(a) See an ancient form, 2 Lil. Ent. 355; in replevin, Pleader's A. 474. The above form is prescribed in *all actions* by Reg. Gen. Hil. T. 4 W. 4.

(b) See the form, 1 Saund. 349.

XL. PROCEEDINGS IN DEBT, &c.

PROCEEDINGS IN DEBT, &c.

Suggestion on judgment in Q. B. by default in debt on bond, stating condition and breaches in declaration under stat. 8 & 9 W. 3, c. 11, s. 8, with prayer of writ of inquiry and award thereof.

In the Queen's Bench [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A. D. ——, [*date of declaration.*]

London, to wit. A. B. by —— his attorney, complains of C. D. &c. [*here copy the declaration, stating therein the condition of the bond and breaches verbatim to the end, and then proceed on a new line as follows:*] And afterwards, to wit, on the —— day of ——, A. D. —— [*day of signing interlocutory judgment*], the defendant, by G. H. his attorney, says nothing in bar or preclusion of the said action of the plaintiff, whereby the plaintiff remains therein undefended against the defendant; wherefore, on the —— day of ——, A. D. —— [*day of signing interlocutory judgment*], the plaintiff ought to recover against the defendant his said debt, and also his damages which he had sustained as well on occasion of the detaining the said debt, as for his costs and charges by him about his suit in this behalf expended. But because it is convenient and necessary that final judgment of and upon the premises aforesaid should not be given until such time as the truth of the said breaches above assigned shall have been inquired into, and the damages by the plaintiff sustained by reason of the said breaches shall have been assessed by a jury of the country in that behalf, according to the form of the statutes in such case made and provided, let the giving of judgment hereupon be stayed until such time accordingly. And because, according to the form of the statutes in such case made and provided, a jury of the country ought to inquire of the truth of the said breaches, and to assess the damages that the plaintiff hath sustained thereby, and the plaintiff having had our writ for that purpose [*if the writ is not to be executed before the sheriff, here add,* "by the order of the Court here in that behalf," *or* "by the order of ——, one of the justices of the Court here in that behalf," *or if a judge of another Court alter this accordingly*], therefore S. S. Esquire, the sheriff of the said county, is commanded to summon twelve good and lawful men of his bailiwick to appear before him the said S. S. [*or if at nisi prius in Q. B. say,* "before the Right Honourable Thomas, Lord Denman, her majesty's chief justice assigned to hold pleas in the Court of our lady the queen, before the queen herself," *or if in C. P.* "before the Right Honourable Sir Nicholas Conyngham Tindal, Knight, her majesty's chief justice of the Bench here," *or in Exch.* "before the Right Honourable James, Lord Abinger, chief baron of her majesty's Court of Exchequer," *or if the inquiry is to be at the assizes,* "before her majesty's justices assigned to take the assizes in and for the said county of ——"], on —— at —— by their oath diligently to inquire of the truth of the said breaches and to assess the damages which the plaintiff hath sustained thereby; and let the said sheriff [*or* "chief justice," *or* "chief baron," *or* "justices of assizes"]

make return of the said writ in that behalf to our said lady the queen at Westminster [*or in C. P.* "to the justices here," *or in Exch.* "to the barons here"], on ——, together with the said writ: the same day is given to the parties aforesaid [*or upon judgment by default*, "to the plaintiff"] at the same place.

The like, where the breaches are not assigned in the pleadings, but are suggested after the judgment.

Commencement as in preceding form.] Wherefore, on the —— day of ——, A.D. —— [*day of signing interlocutory judgment*], the plaintiff ought to recover against the defendant his said debt, and also his damages which he hath sustained as well on occasion of the detaining the said debt, as for his costs and charges by him about his suit in this behalf expended. And hereupon the plaintiff, according to the form of the statute in such case made and provided, suggests and gives the Court here to understand and be informed, that the said writing obligatory was subject to a certain condition thereunder written, whereby after reciting that &c. [*state the recitals in the past tense*], it was declared that the condition of the said writing obligatory was such that if &c. [*state the condition in the past tense* (*a*)] as by the said writing obligatory, reference being thereunto had, will more fully appear [*then state the breaches thus:*] Nevertheless for a breach of the said condition of the said writing obligatory, the plaintiff, according to the form of the statute in such case made and provided, suggests and gives the Court here to understand and be informed, that the defendant did not, nor would &c. [*state the breach; and if there be two or more breaches, state them thus:*] And the plaintiff, for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, further suggests and gives the Court here to understand and be informed, that &c. [*state the further breach. Conclude stating the award of the writ of inquiry as in the preceding form, except instead of the words* "breaches assigned," *say*, "breaches suggested."

Writ of inquiry, to be executed before the sheriff, where the breaches have been assigned in the pleadings.

Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland queen, defender of the faith, to the sheriff of ——, greeting: Whereas A. B. lately in our Court before us [*or in C. P.* "before our

(*a*) If the bond be for the performance of covenants in another indenture, then such indenture must be here set forth, as thus: And the plaintiff further suggests and gives the Court here to understand and be informed, that in and by the said indenture of release mentioned and referred to in the said condition of the said writing obligatory, the defendant, for the consideration therein mentioned, did grant, &c. [*as in indenture*] to have and to hold, &c. [*as in indenture*] but subject nevertheless to a certain proviso, condition or agreement for the redemption of the said premises, being the proviso or condition mentioned and referred to in and by the said condition of the said writing obligatory in that behalf, whereby it was provided &c. [*reciting the proviso.*] And for a breach of the said condition of the said writing obligatory, the plaintiff according to the form of the statute in such case made and provided, further suggests and gives the Court here to understand and be informed that the defendant did not nor would well and truly pay or cause to be paid unto the said A. B. the said sum of £—— and interest in the said condition of the said writing obligatory mentioned, on the said —— day of ——next ensuing the date of the said writing obligatory, or at any time before or afterwards, according to and in full discharge of the said proviso or condition mentioned and referred to in and by the said condition of the said writing obligatory, and according to the form and effect of the same condition, and wholly neglected and refused so to do, and therein failed and made default, and the said sum of £——, together with a certain other sum of money, to wit, £——, as and for the interest thereof, is still wholly due and unpaid to the plaintiff, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at &c. aforesaid; and because &c. [*conclude from the* in the preceding form.*

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justices," *or in Exch.* "before our barons of the Exchequer"], at Westminster, by P. A. his attorney [*or if in person, say,* "in his own proper person"], complained of C. D. who had been summoned [*as in the commencement of the declaration*], to answer the said A. B. in an action of debt, and he demanded of him £——, which he owed to and unjustly detained from him *: For that whereas the defendant &c. [*reciting the declaration throughout,*] to the damage of the said A. B. of £——, as he said, and therefore he brought his suit &c. And such proceedings were thereupon had in our said Court, that it was afterwards considered by the same Court, that the said A. B. ought to recover against the said C. D. his debt aforesaid, together with his damages which he had sustained on occasion of the detention thereof, as for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record [*or in C. P. omit the words,* "as appears to us of record," *or in Exch. say,* "as by inspecting the rolls of our said Exchequer will more fully appear;"] and the said A. B. having prayed out writ to inquire of the truth of the aforesaid breach [*or* "breaches"] of the said condition of the said writing obligatory above assigned, and to assess the damages which the said A. B. hath sustained thereby; therefore, according to the form of the statutes in such case made and provided, we command you the said sheriff, that you summon twelve free and lawful men of your bailiwick to appear * before you, by their oath, diligently to inquire of the truth of the said breach [*or* "breaches"] and to assess the damages which the said A. B. hath sustained by reason of the same; and that you send to us [*or in C. P.* "to our justices," *or in Exch.* "to our barons,"] at Westminster, on —— the inquisition which you shall thereupon take under your seal and the seals of those by whose oath you shall take that inquisition, together with this writ. Witness —— [*name of chief justice, or in Exch. of chief baron*], at Westminster, the —— day of —— in the —— year of our reign.

The like, where the breaches have not been assigned in the pleadings, but have been suggested.

Proceed as in the preceding form to the asterisk, and then thus:] Upon and by virtue of a certain writing obligatory, in the penal sum of £——, bearing date &c. [*date of bond*] and sealed with the seal of the said C. D.* And such proceedings were thereupon had in our said Court that it was afterwards considered by the same Court, that the said A. B. ought to recover against the said C. D. his debt aforesaid, together with his damages which he had sustained on occasion of the detention thereof, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record [*or in C. P. or in Exch. as supra:*] And thereupon the said A. B. according to the form of the statute in such case made and provided, suggested upon the roll whereon the said judgment so recovered against the said C. D. as aforesaid is entered to the effect following, to wit, that the said writing obligatory, whereon the said judgment was so recovered against the said C. D. as aforesaid, was made and given by him the said C. D. under and subject to a certain condition thereto subscribed, whereby, after reciting &c. [*state the recital*] it was declared, that if &c. [*state the condition in the past tense:*] And the said A. B. further suggested on the said roll, whereon the said judgment so recovered against the said C. D. was and is so entered as aforesaid, that &c. [*state the suggestion of breaches, &c. as in the form ante, 549, to the prayer of the writ of*

inquiry, and then proceed thus:] as we have received information from the said A. B. in our said Court: And the said A. B. having prayed our writ, to inquire of the truth of the aforesaid breaches of the said condition of the said writing obligatory above suggested, and to assess the damages which he the said A. B. hath sustained thereby; therefore, according to the form of the statutes in such case made and provided, we command you the said sheriff, that &c. [*conclude as in the preceding form.*

Writ of inquiry to be executed before the chief justice or justices of assize, where the breaches have been assigned in the pleadings.

Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland queen, defender of the faith, to the sheriff of ——, and to the Right Honourable Thomas, Lord Denman, our chief justice assigned to hold pleas in our Court before us, [*or in C. P.* " and to Sir Nicholas Conyngham Tindal, Knight, our chief justice of the Bench," *or in Exchequer*, " and to the Right Honourable Sir Frederick Pollock, Knight, chief baron of our Court of Exchequer," *or if the writ is to be executed at the assizes*, " and to our justices assigned to take the assizes in and for your county,"] greeting: Whereas A. B. lately &c. [*proceed as in the form ante, 549, 550, to the *, and then thus:*] before the Right Honourable Thomas, Lord Denman, our chief justice aforesaid, [*or in C. P.* " Sir Nicholas Conyngham Tindal, Knight, our chief justice aforesaid," *or in Exchequer*, " the Right Honourable Sir Frederick Pollock, Knight, our chief baron aforesaid," *or at the assizes*, " our said justices of assizes,"] on —— [*the first day of sitting, or the commission day of the assizes,*] at Westminster Hall, in the county of Middlesex, [*or* " at the Guildhall of London," *or* " at ——, [*where the assizes are to be holden,*] in your county,"] by their oath, diligently to inquire of the truth of the said breach [*or* " breaches"] and to assess the damages which the said A. B. hath sustained by reason of the same; and have you there then this writ, before our said chief justice [*or* " chief baron," *or* " justices of assizes,"] that the inquisition which shall thereupon be taken before him, [*or* " them,"] he [*or* " they,"] certify to us, [*or in C. P.* " to our justices," *or in Exch.* " to our barons,"] at Westminster, on ——, under his seal [*or* " their seals,"] together with the names of those by whose oath he [*or* " they"] shall take the said inquisition: and he [*or* " they"] have there then [*or in C. P. or in Exch. omit the word* " then,"] this writ. Witness —— [*name of chief justice, or in Exch. of chief baron*], at Westminster, the —— day of ——, in the —— year of our reign.

The inquisition and return where the inquiry was executed before the sheriff.

—— to wit. An inquisition indented, taken at the Secondaries' Office, &c. [*or* " at the house of ——, called or known by the name or sign of ——, in the said county of ——," *as in the notice of inquiry,*] on the —— day of ——, in the —— year of the reign of our lady Queen Victoria, before S. S. sheriff of the county aforesaid, by virtue of a writ of our said lady the queen to the said sheriff directed and delivered, and to this inquisition annexed, to inquire of the truth of the within-mentioned breach of the condition of the within-mentioned writing obligatory, and to assess the damages which the within-named A. B. hath sustained thereby, by the oath of J. J., T. P., &c. [*name the jurors who sat on the inquest,*] honest, free and lawful men of the said county, who being charged and sworn, upon their oath say that the said breach of the said condition is true, and that the said A. B. hath sustained damages by the aforesaid breach to the sum of £——, besides

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his costs and charges by him about his suit in this behalf expended, and for his costs and charges aforesaid, the sum of 40*s*. In witness whereof, as well I the said sheriff as the said jurors have set our seals to this inquisition the day and year above written.

[*Signatures and seals of the sheriff and jurors.*]

Sheriff's return to be indorsed thereon.

The execution of this writ appears in the inquisition hereunto annexed.

The answer of S. S. sheriff.

The like, where the inquiry was executed at the sittings or assizes.

—— to wit. An inquisition indented, taken before me Thomas, Lord Denman, her majesty's chief justice assigned to hold pleas in the Court of our lady the queen, before the queen herself, [*or in C. P.* " Sir Nicholas Conyngham Tindal, Knight, her majesty's chief justice of the Bench," *or in Exchequer*, " the Right Honourable Sir Frederick Pollock, Knight, her majesty's chief baron of the Exchequer at Westminster," *or at the assizes*, " before us —— and ——, her majesty's justices assigned to take the assizes in and for the county of ——,"] on ——, the —— day of ——, in the year of our Lord 18—, at —— in the county of ——, by virtue of her majesty's writ, directed to the sheriff of the said county, and to me the said chief justice, [*or* " chief baron," *or* " to us the said justices of assizes,"] and to this inquisition annexed, by the oath of J. J. &c. [*names of jurors*] twelve good and lawful men of the county aforesaid, who being sworn and charged, upon their oath say, that the breach [*or* " breaches"] of the condition of the said writing obligatory in the said writ mentioned is [*or* " are"] true; and that A. B. in the said writ named hath sustained damages by the aforesaid breach [*or* " breaches"] of the said condition, besides his costs and charges by him about his suit in this behalf expended, to £——. In witness whereof I the said chief justice [*or* " chief baron"] have hereunto set my hand and seal, [*or* " we the said justices of assize have hereunto set our hands and seals,"] the day and year and at the place above-mentioned.

Judge's return thereto.

The execution of this writ appears in the inquisition hereunto annexed.

The answer of ——, the chief justice [*or* " chief baron," *or* " of —— and ——, the justices of assize,"] within named.

Judgment on demurrer to a replication in debt on bond, with suggestion and prayer, and writ of inquiry, on stat. 8 & 9 Will. 3, c. 11, s. 8. (*b*)

To the end of the demurrer book, and then as follows:] At which day, before our said lady the queen, at Westminster, come the parties aforesaid, by their attornies aforesaid, whereupon all and singular the premises being seen, and by the Court of our said lady the queen now here fully understood, and mature deliberation being thereupon had, it appears to the said Court here that the said plea in manner and form aforesaid by the plaintiff above in reply pleaded, and the matters therein contained, are sufficient in law for him the plaintiff to have and maintain his aforesaid action thereof against the defendant, wherefore the plaintiff ought to recover his said debt, together with his damages, on occasion of the detention thereof; (*c*) and here-

(*b*) See another form, 1 Saund. 58, note, 1. d.

(*c*) In 1 Saund. 58, note, 1. d.; 3 B. & P. 612, this form is recommended; and see 3 Dow, 1; but see Tidd's Prac. 9th edit. 584, 585; and Tidd's Forms, 6th edit. 302, where it is said that judgment is to be as at common law.

upon the plaintiff, according to the form of the statute &c. says, that the said writing obligatory in the said declaration mentioned was made and given by the defendant under and subject to a certain condition thereto subscribed, whereby, after reciting &c. it was declared &c.; and the plaintiff further saith &c. [*suggesting the breaches of the condition*]; (*d*) and hereupon the plaintiff &c. [*Proceed with the prayer of the writ of inquiry to the end as ante*, 548.

The like, in another form. (*e*)

To the end of the demurrer book, and then as follows:] Whereupon all and singular the premises being seen, and by the Court here more fully understood, and mature deliberation being thereupon had, for that it appears to the Court here, that the plea by the defendant in form aforesaid above pleaded is not sufficient in law to bar the plaintiff from having his said action thereof maintained against the defendant, it is considered, that the plaintiff ought to recover his said debt and his damages on occasion of the detention of the said debt, and his costs and charges by him about his suit in that behalf expended; but because it is convenient and necessary that judgment hereof should not be given until the truth of certain breaches of covenant hereafter suggested shall be inquired into, and the damages which the plaintiff has sustained by reason of those breaches shall be assessed by a jury of the country in that behalf, let judgment hereof be stayed until such time as the said premises shall be ascertained as aforesaid; and hereupon the plaintiff, according to the form &c. [*Here suggest the breaches.*] And because according to the form of the statute in such case made and provided, a jury ought to inquire of the truth of the breaches above assigned, and to assess the damages that the plaintiff has sustained thereby, therefore the sheriff of the said county is commanded &c. [*Proceed to the end same as ante*, 548.

The like, in another form, where the breaches were assigned in the declaration or replication, and final judgment is stayed until after the damages have been assessed. (*f*)

As in the last, to the end of the finding of the Court, that the replication is sufficient in law, and then as follows:] Wherefore the plaintiff ought to recover against the defendant his said debt, together with his damages by him sustained, as on occasion of the detention thereof &c. as for his costs and charges in this behalf. But because it is convenient and necessary that judgment should not be given hereupon until the truth of the aforesaid breaches of the said condition of the said writing obligatory above assigned shall have been inquired into, and the damages which the said plaintiff has sustained thereby shall have been assesed by a jury of the country in that behalf, according to the form of the statute in such case made and provided, therefore let judgment be hereupon stayed in the mean time; and the plaintiff having prayed the writ of our said lady the queen to be directed &c. [*Proceed with the prayer and award of the writ of inquiry, as ante*, 548, *to the end.*

(*d*) See forms of breaches, *ante*, vol. ii. If the breaches, &c. were suggested in the declaration, this suggestion is to be omitted.

(*e*) See 1 Saund. 58, d.; 3 B. & P. 612.

(*f*) See form, 1 Saund. 58, n. 1; Tidd's Forms, 6th edit. 304, and notes to the last form; and see 3 Dow, 1.

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In the Queen's Bench [*or* "C. P." *or* "Exch. of Pleas."]

On the —— day of ——, A.D. ——, [*date of declaration.*]

Middlesex, to wit. A. B. by —— his attorney, complains of C. D. who has been summoned to answer the said A. B. in an action &c. [*Here proceed with declaration and pleadings, and day given to produce record.*

Judgment on issue of *nul tiel record* and suggestion of breaches, which were not assigned in declaration or replication. (*g*)

At which day, before our said lady the queen, at Westminster, comes the plaintiff by —— his attorney aforesaid, and the defendant, although solemnly demanded in open Court to appear and produce the said record by him above in pleading alleged, cometh not nor produceth the same, but therein wholly fails and makes default, wherefore the plaintiff ought to recover against the defendant his damages by occasion of the premises; and hereupon (*h*) the plaintiff, according to the form of the statute in such case made and provided, says, that the said writing obligatory was made and given under and subject to a certain condition thereunder written, whereby it was declared &c. [*Here set out the condition of the bond.*] And for assigning a breach of the said condition of the said writing obligatory according to the form of the statute in such case made and provided, the plaintiff suggests, and gives the Court here to understand and be informed, that after the making of the said writing obligatory, to wit, on &c. the said sum of £—— of lawful money of Great Britain, so payable on that day as aforesaid, and interest from the date thereof, became and was due and owing from the defendant to the plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said condition of the said writing obligatory; and for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, the plaintiff suggests and gives the Court here to understand and be informed, that after the making of the said writing obligatory, to wit, on &c. the further sum of £—— of like lawful money, being the said second instalment in the said condition mentioned, became and was due and owing from the defendant to the plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said condition of the said writing obligatory. And hereupon the plaintiff prays a writ to be directed to the sheriff of ——, and to the Right Honourable Thomas Lord Denman, her majesty's chief justice, assigned to hold pleas in the Court of our said lady the queen, before the queen herself, commanding the said sheriff that he cause to come before the said chief justice, on &c. next, at Westminster, in the county of Middlesex, twelve &c. and who neither &c. to inquire of the truth of the said breaches above assigned, to assess the damages thereby sustained by the plaintiff; and also that it may be commanded in the said writ to the said justice that he make a return thereof to the said Court of our said lady the queen, before the queen herself, at Westminster, on —— the —— day of —— next, and it is granted to him &c.; the same day is given to the plaintiff at the same place. [*Before the late rule a continuance was here entered, but by* Prac. Reg. Gen. Hil. T. 4 W. 4, reg. 2, *no entry of continuances by* vice comes non misit breve *or otherwise shall be made, &c.* And afterwards, to wit, on &c. [*Here state the return of the inquisition and final judgment, as ante*, 551.

Prayer of inquiry and award thereof.

(*g*) See necessity for this form, *D'Aranda v. Houston*, 6 Car. & P. 511.

(*h*) If the condition and breach have been assigned in the declaration or replication, the suggestions will be here omitted, and the entry proceed at once with the prayer of inquiry.

After the plea of oyer of bond and condition, and non est factum, *and* similiter, *proceed as follows:*] And hereupon the plaintiff prays that the said writing obligatory in the said declaration mentioned may be enrolled, and the same is accordingly enrolled in these words, to wit, [*here set out the obligatory part of the bond verbatim.*] He also prays, that the condition of the said writing obligatory may be enrolled, and the same is accordingly enrolled in these words, to wit: Whereas &c. [*Here set out the condition of the bond, beginning with the recital, if any.*] And for a breach of the said condition of the said writing obligatory, the plaintiff, according to the form of the statute in such case made and provided, suggests and gives the Court here to understand and be informed, that &c. [*assigning the breach, and concluding as follows:*] Therefore, as well to try the said issue above joined between the said parties; and in case the said issue shall be found for the plaintiff, to inquire of the truth of the said breach in form aforesaid above assigned, and to assess the damages sustained thereby, the sheriff is commanded that he cause to come before our lady the queen, [*or in C. P.* "before the justices of the Bench, at Westminster," *or in Exch.* "before the barons of the Exchequer, at Westminster,"] on &c., twelve &c. by whom &c. and who neither &c. to recognize &c. because as well &c. the same day is given to the parties aforesaid. See Tidd's Forms, 6th edit. 273.

Issue and suggestion of breaches after plea *non est factum*, on the stat. 8 & 9 W. 3, c. 11, s. 8, with award of *venire, tam ad triandum, quam ad inquirendum.*(i)

To the end of the similiter to defendant's plea, and then as follows:] And thereupon the plaintiff, according to the form of the statute in such case made and provided, suggests, and gives the Court here to understand and be informed, that the said writing obligatory in the said declaration mentioned was and is subject to a certain condition thereunder written, whereby, after reciting that whereas &c. [*setting out the whole of the recitals carefully,*] the condition of the said writing obligatory was declared to be such, that if (&c. then &c. otherwise &c.) nevertheless for assigning breaches of the said condition of the said writing obligatory, the plaintiff in fact saith, that &c. [*setting out the breach of the condition as in debt on bond*] contrary to the form and effect of the said writing obligatory and of the said condition thereof, and to the damage of the plaintiff of £——: therefore, according to the form of the statute in such case made and provided, the sheriff is commanded &c. [*as in last form*] twelve &c. by whom &c., and who neither &c. because &c.

The like in another form. (k)

(i) See Tidd's Forms, 6th edit. 281. This is proper in Q. B., 8 T. R. 255, in which it was decided, that in debt on bond, after oyer of the condition, and *non est factum* pleaded, and issue joined thereon, the plaintiff *may* enter a suggestion of breaches. See also 2 Saund. 187 a; and 2 New Rep. 362: but in 5 Taunt. 386; 1 Marsh. 95; *D'Aranda* v. *Houston*, 6 Car. & P. 511, it was held, that in debt on bond, conditioned for the performance of covenants, if the defendant crave oyer and pleads performance of each covenant specially, and also general performance, the plaintiff *must* assign breaches in his *replication*, if he has not done it in his declaration; and if he merely take issue on the general performance, and enters a separate assignment of breaches on the record, no damages can be assessed on them, and the Court will award a repleader. See also *D'Aranda* v. *Houston and others*, 6 Car. & P. 511, where in debt on a bond, (with *non est factum inter alia* pleaded), to secure the payment by instalments of the consideration for the purchase of a business, it was held, that plaintiff ought to suggest breaches, and that if he has not done so, and a verdict be found for him on the plea of *non est factum*, he is not entitled to a certificate for speedy execution, under the statute; *Id. ib.* The preferable course is in general to assign the condition and breach in the *declaration;* 1 Saund. 58, note 1; 2 Saund. 187 a, note 2; but *quære* this now; see *ante*, vol. i. page 383; it is better to assign the breaches in the replication. It is quite clear they may be assigned, though they cannot be *assigned* as well as *suggested* in the replication; see 2 New Rep. 362; 2 Saund. 187 a, 5th edit.

(k) See the preceding form and notes.

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as well to try the said issue above joined between the said parties, as to inquire of the truth of the matters by the plaintiff above suggested, and to assess what damages the plaintiff hath sustained by reason of the said breaches of the said condition of the said writing obligatory. The same day is given to the parties aforesaid, at the same place &c.

Suggestion of breach of condition which has been before set out in declaration or plea with award of *venire*, to try issue, ascertain truth of breaches, and assess damages. (*l*)

At the end of the replication to non est factum, *or special plea of fraud, &c. proceed thus:*] And hereupon the plaintiff, for assigning a breach of the condition of the said writing obligatory, and with intent to try the truth thereof, and to recover his damages by him sustained upon occasion thereof, according to the form of the statute in such case made and provided, suggests, and gives the Court here to understand and be informed, that the defendant did not nor would well and truly pay, or cause to be paid, unto the plaintiff, the said yearly rents or sums of £——, as in the said condition mentioned; but on the contrary thereof, after the making the said writing obligatory, to wit, on &c. a certain large sum of money, to wit, £—, became and was due from the defendant to the plaintiff, and still is due and unpaid, contrary to the form of the said writing obligatory and the said condition thereof, therefore, according to the form of the statute in that case made and provided, the sheriff is commanded that he cause to come on —— before &c. twelve &c. by whom &c., and who neither &c. because &c. as well to try the issue above joined between the said parties as to inquire of the truth of the matters by the plaintiff above suggested, and to assess what damages the plaintiff hath sustained by reason of the said breach of the condition of the said writing obligatory, the same day is given to the said parties aforesaid, at the same place &c.

Another form, where the breach of the condition is stated in the declaration or replication. (*m*)

The form of the issue is as above, except that the condition of the bond and breach are stated in the declaration or in the replication, and after the similiter or other issue joined, then proceed with the award of the venire, as well to try the issue as to inquire the truth of the breach, and assess the damages, as in the preceding form.

Judgment after verdict and assessment of damages on stat. 8 & 9 W. 3. c. 11, s. 8. (*n*)

Therefore it is considered that the plaintiff do recover against the defendant his said debt and his damages aforesaid, on occasion of the detention thereof to 1*s.* together with his costs and charges aforesaid to 40*s.* being by the said jury in form aforesaid assessed, and also £—— for his said costs and charges, by the Court of our said lady the queen, before the queen herself, now here adjudged of increase to the plaintiff, and with his assent; it is also considered by her majesty's Court here, that the plaintiff have execution (*n*) against the defendant of the damages aforesaid to £—— by the said jury in form aforesaid assessed on occasion of the aforesaid breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided. And the defendant in mercy, &c.

Mercy.

(*l*) As to this form, see 5 Taunt. 386; 1 Marsh. 95; according to which decisions, if the defendant pleaded performance, the breach must be assigned in the replication, and not suggested; but if the plea were of matter *collateral* to the performance, it should seem that the breach of the condition may be suggested; 2 Saund. 186, 187; 8 T. R. 255; see further *D'Aranda* v. *Houston and another*, 6 C. & P. 511; *ante*, vol. i. page 383.

(*m*) See the notes to the form, *ante*, 555.

(*n*) There seems to be no occasion for this judgment, that plaintiff have execution, &c.

At the end of the judgment, ante, 548, proceed as follows:] Afterwards, to wit, on —— the —— day of —— A. D. ——, before our said lady the queen at Westminster, comes the plaintiff by J. D. his attorney, and according to the form of the statute in such case made and provided, gives the same Court here to understand and be informed that the declaration of the plaintiff in the said action in which he so obtained such judgment as aforesaid was commenced upon the —— day of —— A. D. ——, and that the said action was brought and commenced upon and for certain breaches of the condition of the said writing obligatory by the defendant before the commencement of the said action; and the plaintiff for further and other breaches of the said conditlon of the said writing obligatory, according to the form of the statute in such case made and provided, gives her said majesty's Court here to understand and be informed, that after the recovery of the said judgment, to wit, on the —— day of —— in the year of our Lord ——, a large sum of money, to wit, the sum of £30 : 6*s.* 1*d.* of lawful money of Great Britain, of the said instalments or sums of money in the said condition of the said writing obligatory mentioned, being the said third instalment, together with interest thereon, became and was due and payable from the defendant to the plaintiff, and which said last-mentioned sum of £30 : 6*s.* 1*d.* and interest thereon as aforesaid are still due and owing and in arrear and unpaid from the defendant to the plaintiff, contrary to the form and effect of the said condition of the said writing obligatory; and also that after the recovery of the said judgment, and in the lifetime of the defendant, to wit, on the —— day of —— in the year of our Lord ——, a large sum of money, to wit, £30 : 6*s.* 1*d.* of lawful money of Great Britain, being the fourth instalment or sum of money in the said condition mentioned, together with interest thereon, became due and payable from the defendant to the plaintiff, and which said last-mentioned sum of £30 : 6*s.* 1*d.* and interest as aforesaid are still due, in arrear and unpaid from the defendant to the plaintiff, contrary to the form and effect of the said condition of the said writing obligatory; and also that after the recovery of the said judgment, to wit, on the —— day of —— in the year of our Lord ——, a large sum of money, to wit, the sum of £30 : 6*s.* 1*d.* of lawful money of Great Britain, being the fifth instalment or sum of money in the said condition mentioned, and interest thereon as aforesaid, became and was due and payable from the defendant to the plaintiff, and which said last-mentioned sum of £30 : 6*s.* 1*d.* and interest thereon as aforesaid, are still due, in arrear and unpaid from the defendant to the plaintiff, contrary to the form and effect of the said condition of the said writing obligatory; which said three last-mentioned breaches of the said condition so assigned the plaintiff doth aver, and doth give her majesty's Court here to understand and be informed, are further and other breaches of the said condition than the said breaches, for and by reason of which he obtained the said judgment so by him recovered as aforesaid; and hereupon the plaintiff, according to the form of the statute in such case made and provided, prays the writ of our said lady the queen of *scire facias* upon the said judgment so obtained as aforesaid against the defendant

Suggestion of three further breaches to be entered on the roll in order to found *scire facias* for such further breaches. (*o*)

(*o*) In the older edition of Tidd's Forms there is a form nearly similar to the above, but in the latter editions it is omitted. It should seem that the *scire facias* may be issued in the first instance; see 8 & 9 W. 3, c. 11, s. 8.

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to be directed to the said sheriff of Middlesex, suggesting the said further and other breaches of the said condition of the said writing obligatory hereinbefore assigned, and commanding the said sheriff to summon the defendant to show cause why execution should not be had and awarded upon the said judgment for the damages which the plaintiff hath sustained by reason of the said further and other breaches of the said condition of the said writing obligatory, and it is granted to him &c. returnable before our said lady the queen at Westminster on —— the —— day of —— next, the same day is given to the defendant at the same place.

Writ of *scire facias* thereon, viz. *scire facias* for three further breaches of condition of the bond on which judgment had been obtained. (p)

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland queen, defender of the faith, to the sheriff of Middlesex, greeting: Whereas T. V. heretofore, to wit, in —— term, in the —— year of our reign, in our Court before us at Westminster, by the judgment of the same Court recovered against C. D. gentleman, one of the attornies of the Court of our lady the queen, a certain debt of £350, and also £32 : 4*d.* for his damages which he had sustained as well by reason of the detaining of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. was convicted, as by the record and proceedings thereof remaining in our said Court before us at Westminster aforesaid manifestly appear, which said judgment so recovered against the said C. D. as aforesaid was had and obtained upon a certain writing obligatory, bearing date the —— day of —— in the year of our Lord —— and sealed with the seal of the said C. D. whereby the said C. D. became held and firmly bound to the said T. V. in the said sum of £350, to be paid to the plaintiff when he the said C. D. should be thereunto afterwards requested, with and under a certain condition to the said writing obligatory subscribed, whereby, after reciting, &c. [*state recitals*] it was declared that if the said C. D. and E. F. or either of them, their or either of their heirs, executors or administrators, did and should well and truly pay or cause to be paid unto the said T. V. his executors, administrators or assigns the sum of £181 : 16*s.* 6*d.* with lawful interest after the rate of £5 per cent. per annum for the same in manner following, that is to say, the sum of £30 : 6*s* 1*d.* and interest from the date thereof, on the —— day of —— then next ensuing, and the like sum of £30 : 6*s.* 1*d.* and interest from the date thereof, at the end of twelve calendar months from the date thereof, and the like sum of £30 : 6*s.* 1*d.* and interest from the date thereof, at the end of the next succeeding six calendar months, until the whole of the said sum of £181 : 16*s.* 6*d.* and interest as aforesaid should be fully paid and satisfied, without fraud or further delay, then the said obligation was to be void, or otherwise to be and remain in full force and virtue; and whereas the said T. V. heretofore suggested a certain breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, to wit, that after the making of the said writing obligatory, to wit, on the —— day of —— in the year of our Lord —— the said sum of £30 : 6*s.* 1*d.* of lawful money of Great Britain, so payable on that day

(p) See another form of writ of *scire facias* for further breaches on annuity bond, Tidd's Forms, 6th edit. 534; and the like in debt on articles of agreement, Tidd's Forms, 6th edit. 536; and the like in the Exchequer on annuity bond after former *scire facias*, *id.*

as aforesaid, and interest from the date thereof, became and was due and owing from the said C. D. to the said T. V., and was in arrear and unpaid, contrary to the form and effect of the said condition of the said writing obligatory; and also a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, that is to say, that after the making of the said writing obligatory, to wit, on the —— day of —— in the year of our Lord —— aforesaid, the further sum of £30 : 6*s.* 1*d.* of like lawful money of Great Britain, being the said second instalment in the said condition mentioned, became and was due and owing from the said C. D. to the said T. V. and was in arrear and unpaid, contrary to the form and effect of the said condition of the said writing obligatory, and damages were thereupon assessed for and by reason of the breaches assigned. And whereas it hath been and is duly suggested by the said C. D. in our said Court before us, as other and further breaches of the condition of the said writing obligatory than the said breaches so suggested as aforesaid, that after the recovery of the said judgment, to wit, on the —— day of —— in the year of our Lord ——, a large sum of money, to wit, the sum of £30 : 6*s.* 1*d.* [*same as the statement of the further breaches in the suggestions*]; and also that &c. [*as ante, 557, in the suggestion of the second further breach, with the same exception.*] And that after the recovery of &c. [*same as ante, 557*], for which said three last-mentioned breaches of the aforesaid condition of the said writing obligatory the said T. V. hath humbly besought us to provide him a proper remedy,* and we being willing that what is just in this behalf should be done, do according to the form of the statute in such case made and provided command you, that by honest and lawful men of your bailiwick you make known to the said C. D. that he be before us at Westminster on —— the —— day of —— next, to show cause why execution should not be had and awarded against him upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the said last-mentioned breaches of the said condition of the said writing obligatory, if it shall seem expedient for the said C. D. so to do, and further to do and receive what our said Court before us shall then and there consider of him in this behalf, and have there then the names of those by whom you shall so make known to him and this writ. Witness, Thomas Lord Denman, at Westminster, the —— day of —— in the —— year of our reign.

On the —— day of ——, A. D. ——.

Declaration thereon where defendant appeared to second *scire facias*.

Middlesex, to wit. Our lady the queen sent to her Sheriff of Middlesex her writ close in these words, to wit, Victoria &c. [*here copy the preceding writ, and then proceed as follows:*] At which day before our lady the queen at Westminster comes the plaintiff by C. D. his attorney, and the sheriff, to wit, C. M. Esq. and T. C. M. Esq. sheriff of the said county, returned to our said lady the queen, that the defendant hath not anything in his bailiwick whereby he could give him notice as by the said writ he was commanded, nor was the said defendant found in the same, and that the said defendant comes not, but makes default; therefore, as before, it was commanded to the said sheriff, that by honest and lawful men of his bailiwick he should make known to the said defendant that he should be before our said lady

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the queen at Westminster on —— the —— day of —— next, to show in form aforesaid why &c. and further &c. the same day was given to the said plaintiff there &c. at which said day before our said lady the queen at Westminster comes the said plaintiff by his said attorney, and the sheriff as before returneth that the said defendant had not any thing in his bailiwick whereby he could give him notice as by the said writ he was commanded, nor was the defendant found in the same; and the defendant being solemnly demanded, comes in his own proper person, and hereupon the plaintiff prays that execution may be adjudged to him against the defendant upon the said judgment so obtained as aforesaid for the damages to be assessed by reason of the said last mentioned breaches of the said condition of the said writing obligatory, &c.

Writ of inquiry thereon, defendant having suffered judgment in *scire facias*.

N.B.—The defendant suffered judgment by default, whereupon the following writ of inquiry was issued.]

Victoria, by the grace of God of the united kingdom of Great Britain and Ireland queen, defender of the faith, to the sheriff of Middlesex, and to the Right Honourable Thomas, Lord Denman, our chief justice, assigned to hold pleas in our Court before us, greeting: Whereas A. B. heretofore in —— term, in the —— year of our reign, in our Court before us at Westminster, by bill, without our writ, and by the judgment of the same Court recovered against C. D. gentleman, one of the attornies of the Court of our lady the queen, a certain debt of £350 and also £32: 4*d.* for his damages which he had sustained as well by reason of the detaining of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the defendant was convicted as by the record and proceedings thereof remaining in our said Court before us at Westminster aforesaid manifestly appears; which said judgment so recovered against the defendant as aforesaid was had and obtained upon a certain writing obligatory, bearing date the —— day of ——, in the year of our Lord ——, &c. &c. [*same as in the writ of scire facias, ante, 558, to the asterisk, ante, 559, and then proceed as follows:*] And such proceedings were thereupon had in our said Court before us, that it was afterwards considered in and by the same Court that the plaintiff ought to have execution against the defendant upon the same judgment for the damages to be assessed by reason of the said three last-mentioned breaches of the said condition of the said writing obligatory, as appears to us of record, and thereupon the said plaintiff, according to the form of the statute in such case made and provided, hath prayed our writ to inquire of the truth of the said three last mentioned breaches of the said condition of the said writing obligatory, and to assess the damages which he had sustained thereby; therefore, according to the form of the statute in such case made and provided, we command you the said sheriff, that you summon twelve good and lawful men of your bailiwick to appear before the Right Honourable Thomas, Lord Denman, our said lord chief justice, assigned to hold pleas in our said Court before us, on —— the —— day of —— next, at Westminster Hall, in your county of Middlesex, to inquire diligently on their oath of the truth of the premises, and to assess the damages which the plaintiff hath sustained by reason of the said last mentioned breaches, and that you have on that day before our said chief justice this writ. We likewise command our said chief justice that he

certify the inquisition before him taken to us at Westminster, on —— the —— day of —— next, together with the names of those by whose oath such inquisition shall be taken, and that he also have there then this writ. Witness, Thomas, Lord Denman, at Westminster, on the —— day of —— in the —— year of our reign.

Inquisition thereon.

Middlesex, to wit. An inquisition indented, taken before the Right Honourable Thomas, Lord Denman, chief justice of our lady the queen, assigned to hold pleas before the queen herself, at a sitting of nisi prius holden before the said chief justice at Westminster Hall, in the great hall of pleas there, in and for the said county, on —— the —— day of ——, A. D. —— by virtue of the queen's writ hereunto annexed, by the oath of &c. [*here enumerate twelve jurors*] twelve good and lawful men of the bailiwick of the sheriff of the said county, who having been duly summoned to appear before the said chief justice at the sitting aforesaid, and having accordingly appeared and been sworn to inquire the truth of the breaches in the said writ set forth, and to assess the damages, costs and charges in that behalf, upon their oath say, that the several matters in the said writ alleged are true, and that the plaintiff hath sustained damage by occasion thereof to the amount of the sum of £99 : 18*s.* 3*d.* over and above his costs and charges by him about his suit in that behalf expended, and for those costs and charges to 40*s.* In witness whereof, as well the said chief justice as the jurors have hereunto set their hands the day and year first above written.

By the Court.

	£.	s.	d.	£.	s.	d.
For increased costs . .	30	1	9			
				99	18	3
				2	0	0
S. Le Blanc.				30	1	3
				£132	0	0

Damages in the whole.

10th April, 1844.

Final judgment thereon.

As yet of —— Term, in the —— year of the reign of Queen Victoria,

Witness, Thomas, Lord Denman.

Middlesex, to wit. Our lady the queen sent to her sheriff of Middlesex her writ close in these words, that is to say, Victoria. [*Here copy the first* sci. fa. *to the end* verbatim, *and then proceed in a fresh line as follows :*

At which day, before our said lady the queen, at Westminster, comes the said plaintiff by J. L. his attorney, and the sheriff, to wit, C. M., Esq. and T. C. M., Esq. sheriff of the said county, returneth to our said lady the queen, that the defendant hath not any thing in his bailiwick whereby he can give him notice, as by the said writ he is commanded, nor is the defendant found in the same ; and the defendant comes not, but makes default, therefore, as before, it is commanded to the said sheriff, that by honest and lawful

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men of his bailiwick, he make known to the defendant that he be before our lady the queen at Westminster, on the —— day of —— next, to show, in form aforesaid, why &c. and further &c. the same day is given to the plaintiff there &c. at which day, before our said lady the queen at Westminster, comes the plaintiff by his said attorney, and the sheriff, as before, returneth that the defendant hath not any thing in his bailiwick whereby he can give him notice, as by the said last mentioned writ he is commanded, nor is the defendant found in the same; and the defendant, being solemnly demanded, comes in his own proper person, and hereupon the plaintiff prays that execution may be adjudged to him against the defendant upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the said last mentioned breaches of the said condition of the said writing obligatory &c.; and the defendant says nothing to bar or preclude the plaintiff from having execution adjudged to him against the defendant upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the said last mentioned breaches. Wherefore, the truth of the breaches last aforesaid, and the damages thereby sustained, ought to be ascertained and assessed according to the form of the statute aforesaid, by the default of the defendant, and hereupon the plaintiff prays the writ of our said lady the queen to be directed to the sheriff of Middlesex and to the Right Honourable Thomas Lord Denman, her majesty's chief justice, assigned to hold pleas in the Court of our said lady the queen, before the queen herself, commanding the said sheriff that he cause to come before the said chief justice, on —— the —— day of —— next, at Westminster Hall, in the county of Middlesex, twelve good &c. by whom &c. who neither &c. to inquire of the truth of the said last mentioned breaches above assigned, and to assess the damages thereby sustained by the plaintiff, and also that it be commanded in the same writ to the said chief justice that he make a return thereof to the said Court of our said lady the queen, before the queen herself, at Westminster, on —— the —— day of —— next, and it is granted to him &c. the same day is given to the plaintiff at the same place. At which day, before our said lady the queen at Westminster aforesaid, comes the plaintiff by his attorney aforesaid and the said chief justice now here returns a certain inquisition indented, taken before him, at a sitting of nisi prius holden before the said chief justice, holden at Westminster Hall, in the great hall of pleas there, in and for the said county, on —— the —— day of —— in the —— year of the reign of our said lady the queen, by the oath of twelve good and lawful men of the bailiwick of the sheriff of the said county, by which it is found that the several matters in the said writ alleged and assigned as aforesaid are true, and that the plaintiff hath sustained damage by occasion thereof to the amount of the sum of £99 : 18*s.* 3*d.* over and above his costs and charges by him about his suit in that behalf expended, and for those costs and charges to 40*s.* Therefore it is considered that the plaintiff do have execution against the defendant for his damages aforesaid, by the said inquisition in form aforesaid assessed, and also £30 1*s.* 9*d.* for the costs and charges of this suit, by the Court of our said lady the queen now here adjudged of increase to the plaintiff and with his assent, which said damages, costs and charges, in the whole, amount to £132. And the said defendant in mercy &c.

Judgment signed, &c.

Mercy.

In the ——.

The —— day of ——, A. D. ——.

Declaration in scire facias against members of a banking company. (q)

—— to wit. The sheriffs of London were commanded, whereas S. F., J. G. and M. G., lately in the Court of our lady the Queen Victoria of the Bench at Westminster, before Sir N. C. Tindal, Knight, chief justice, and his companions the justices of our said lady the queen of the Bench, under and by virtue of the statute in such case made and provided, by the judgment of the same Court recovered against W. M., one of the public registered officers for the time being of certain persons united in co-partnership for the purpose of carrying on and carrying on the trade and business of bankers in England under the name of the ——, under and by virtue and according to the form and effect of an act of parliament made and passed in the seventh year of the reign of his late Majesty King George the Fourth, (r) for amongst other things the better regulating co-partnerships of certain bankers in England, and which said W. M. had been duly nominated and appointed and registered as such public officer, and was then sued for and on behalf of the said company according to the form and effect of the said act of parliament, £—— for their damages which they had sustained as well on occasion of the not performing certain promises then lately made by the said company to the said S. F. &c. as for their costs and charges by them about their suit in that behalf expended, whereof the said W. M. was convicted, as by the record and proceedings thereof then still remaining in the same Court manifestly appeared, and then on behalf of the said S. F. &c. in the same Court our said lady the queen was informed that although judgment was thereupon given, yet execution of the damages aforesaid still remained to be made to them. And our said lady the queen was also informed on behalf of the said S. F. &c., that T. R. &c. [*fifteen defendants*] at the time of the recovering and giving of the said judgment were and from thence had been and still were members of the said co-partnership, wherefore the said S. F. &c. had humbly besought our said lady the queen to provide them a proper remedy in that behalf, and our said lady the queen, being willing that what was just in that behalf should be done, commanded the said sheriffs that by honest and lawful men of their bailiwick they should make known to the said Thomas Rickerby &c. that they should be before the said justices of our said lady the queen at Westminster, on the 17th of June, 1840, to show if they had or knew, or any or either of them had or knew, of anything to say for themselves or himself why the said Sarah Fowler &c. ought not to have execution against the said Thomas Rickerby &c. of the damages aforesaid, according to the force, form and effect of the said recovery and of the statute in such case made and provided, if it should seem expedient for them so to do, and further to do and receive what our said justices did then and there consider of them in that behalf; and the said sheriff should have there the names of

(q) See form *Fowler and others* v. *Rickerby and others*, 9 Dowl. 682. See also other forms in the cases referred to *infra*. The declaration should be intituled of a day certain; *Collins* v. *Beaumont*, 5 Dowl. 700. The defendant cannot plead to a *scire facias* any matter which might have been pleaded to the original action, but he may plead that he was not a member of the company, and may impeach the judgment on the ground of fraud, but in that case the proper course appears to be to apply to the Court to set aside the writ; see *Bradley* v. *Eyre*, 11 M. & W. 432; *Bradley* v. *Urquhart*, *ibid.* 456.

(r) If the title be set out the whole should be stated.

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those by whom they should make known to them, and that writ, at which day come here the said Sarah Fowler &c., by Thomas Hornby, their attorney, and offer themselves on the fourth day against the said Thomas Rickerby &c., and the sheriffs, to wit, William Evans and John Wheelton, sheriffs of London aforesaid, at that day returned, that the said Thomas Rickerby &c. had not nor had any of them anything in their bailiwick whereby they could make known to them or any of them as by the said writ they were commanded, nor were they the said Thomas Rickerby &c. or any of them found in the same. And the said Thomas Rickerby &c. at that day being solemnly demanded, the said Thomas Rickerby, J. Johnson, J. Wallworth, J. Wallworth the younger, R. Field, John Bennett, and Joseph Bennett, by Edward Chester, their attorney, comes; and the said J. Allen and H. Allen, by J. Lucas, their attorney, comes; and the said J. Chittle, by William Fisher, his attorney, comes; and the said Joseph Marler, by S. H. Bower, his attorney, comes; and the said Sarah Fowler &c. pray that execution against the said Thomas Rickerby &c. [*reciting the names of those twelve out of the fifteen defendants who had appeared*] may be adjudged to them of the damages aforesaid, according to the force, form and effect of the said recovery and of the statute in such case made and provided.

XLI. DECLARATIONS, PLEAS, &c. IN ACCOUNT.

PROCEEDINGS IN ACCOUNT.

In the Common Pleas.

The —— day of ——, A. D. ——.

Declaration by one tenant in common against his co tenant, for not accounting; first count stating defendant to have been tenant in common. (a)

London, to wit. A. S. was summoned to answer to W. S. in a plea that she render to the said W. S. a reasonable account for the time during which she was bailiff to the said W. S. in the parish of [St. Botolph, Bishopsgate Street,] in the [city of London.] And thereupon the said W. S. by ——, his attorney, saith, that whereas heretofore, to wit, on the —— day of ——, in the year of our Lord ——, and from thence for a long space of time, to wit, hitherto, the said plaintiff was lawfully possessed of one undivided moiety or half part, the whole in moieties to be divided [*or if the plaintiff was seised in fee, say*, " the plaintiff was seised in his demesne as of fee of and in one undivided &c."] of and in a certain messuage with the appurtenances, situate &c. for the rest and residue of a certain term, to wit, the term of six years, commencing &c. with the defendant, and the defendant during all that time held the said tenement with the appurtenances together with the plaintiff as tenants in common [*or if the seisin was in fee, say*, " and the defendant and divers other persons, whose names are to the plaintiff unknown, during all that time held the said tenements with the appurtenances together with the plaintiff as tenants in common]; and the defendant had also during all that time the care and management of the whole of the premises with the appurtenances, to receive and take the rents, issues and profits thereof, and, as bailiff of the plaintiff, of what she received more than her just share and proportion thereof, to render a reasonable account to the plaintiff and his said share thereof, when the defendant should be thereunto afterwards requested, according to the form of the statute &c.; and although the defendant during the time aforesaid received more than her just share and proportion of the rents, issues and profits of the said tenements with the appurtenances, and the plaintiff's share thereof, that is to say, the whole of the rents, issues and profits of the said tenements with the appurtenances; yet the defendant, although she was afterwards, to wit, on &c. requested by the plaintiff so to do, hath not yet rendered a reasonable account to the plaintiff of the said rents, issues and profits so received as aforesaid, or either of them or any part thereof, or of the said share of the plaintiff or any part

(a) See forms of declarations, pleas, &c. 1 Wentw. 81, *id.* Index, Account. As to the law, see Bac. Abr. Account; Selw. N. P. Account; Willes, Rep. 208; 3 Wooddes. 83; 5 Taunt. 431; Marsh. 115, S. C.; 2 Campb. 238; Tidd, 9th edit. 1, 2. See a declaration and proceedings in account relative to goods or personal property, 3 Wils. 73 to 94. As to the appointment of auditors, 2 Chit. Rep. 10; Tidd, 9th edit. 2. An action of account may still be proceeded in, but the remedy by assumpsit for money had and received, when sustainable, or a bill in equity to account, is usually preferred.

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thereof, but hath hitherto wholly neglected and refused so to do, contrary to the form of the statute in that case made and provided.

Second count, against defendant, as bailiff of a moiety, not disclosing that defendant was tenant in common. (*b*)

And whereas also the defendant, heretofore, to wit, on the day and year aforesaid, and from thence for a long space of time, to wit, hitherto, was bailiff to the plaintiff of one undivided moiety or share of certain other messuages, tenements and premises, to wit, &c., situate and being at the parish aforesaid, and the defendant, during all the time last aforesaid, as such bailiff, took and received the rents, issues and profits of the said last mentioned tenements with the appurtenances, to render a reasonable account thereof to the plaintiff when she should be thereunto requested; yet the defendant, although she was afterwards, to wit, on &c. requested by the plaintiff so to do, hath not as yet rendered a reasonable account to the plaintiff of the said last-mentioned rents, issues and profits so received as aforesaid, or either of them, or any part thereof, but hath hitherto wholly neglected and refused so to do, contrary to the form of the statute aforesaid, wherefore the plaintiff says he is injured, &c. [*Common conclusion.*

Pleas to first count of declaration similar to the above form, that defendant was not bailiff, &c. (*c*)

Orpwood ats Featherstone and Wife. } And the defendant, by ——, his attorney, comes and defends the wrong and injury when &c. and as to the said cause of action in the said [first] count of the said declaration mentioned, the defendant says, that he the defendant never had the care and management of the said premises with the appurtenances in the said [first] count of the said declaration mentioned, or any part thereof, to receive and take the rents, issues and profits thereof, or as bailiff of the said J. and E. his wife, in right of the said E., of what he received more than his just share and proportion thereof to render a reasonable account to the said J. and E., and their said shares thereof, when he the defendant should be thereunto afterwards requested, in manner and form as the said J. and E. his wife have in the said first count of the said declaration above alleged. And of this the defendant puts himself upon the country, &c.

Second plea, that defendant did not receive more than his just share of the rents, &c.

And for a further plea in this behalf, as to the said supposed cause of action in the said first count of the said declaration mentioned, the defendant says, that he the defendant did not receive more than his just share and proportion of the rents, issues and profits of the said premises with the appurtenances in the said first count of the said declaration mentioned, and the said J. and E.'s share thereof, in manner and form as the said J. and E. have in the said first count of the said declaration above alleged. And of this also the defendant puts himself upon the country, &c.

Third plea, that he has fully accounted.

And for a further plea in this behalf, as to the said cause of action in the said first count of the said declaration mentioned, the defendant says, that after the time during which the said J. is in the first count of the said declaration alleged to have had the care and management of the said premises with the appurtenances in the said first count mentioned, to receive and take the

(*b*) See Willes Rep. 208, 210.

(*c*) See forms of pleas, &c. in account, 3 Wils. 75 to 118; 1 Wentw. 88, and the Index at the end of that volume.

rents, issues and profits thereof, and as bailiff of the said J. and E. to render such account as therein mentioned, to wit, on &c. at &c. aforesaid, he the defendant fully accounted with the said J. and E. concerning the said time and the said rents, issues and profits in the said first count of the said declaration mentioned, and their said share thereof. And this &c., therefore, &c.

Fourth plea to last count, that defendant never was bailiff, and took the rents, &c.

And as to the said cause of action in the said last count of the said declaration mentioned, the said defendant says, that the said defendant never was bailiff to the said J. and E. of the said part or share of the said premises with the appurtenances in the said last count of the said declaration mentioned or any part thereof, nor ever took or received the rents and profits of the said premises with the appurtenances in the said last count of the said declaration above alleged. And of this also the said defendant puts himself upon the country, &c.

Fifth plea to last count, that he had fully accounted.

And for a further plea in this behalf, as to the said supposed cause of action in the said last count of the said declaration mentioned, the defendant says, that after the time during which the defendant is therein alleged to have been the bailiff of the said J. and E. as in the said last count is mentioned, and as such bailiff to have taken and received the rents and profits therein mentioned, to wit, on the —— day of ——, in the year of our Lord ——, to wit, at &c. aforesaid, he the defendant fully accounted with the said J. and E. concerning the said time and the said rent, issues and profits received as in the said last count is mentioned. And this he is ready to verify; and therefore he prays judgment if the said J. and E. ought to have or maintain their aforesaid action thereof against him, &c.

XLII. PROCEEDINGS IN QUARE IMPEDIT. (a)

PROCEEDINGS IN QUARE IMPEDIT.

[*County.*]

Præcipe for writ of *quare impedit.* (b)

Quare Impedit for —— against ——, bishop of ——, and —— and ——, to show wherefore they hinder the said —— from presenting —— a fit person to the church of —— in the county of ——, which is void and in the gift of the said ——, as it is said, &c.

——, Attorney. Returnable

[Date.]

Original writ in *quare impedit.* (c)

Victoria, by the grace of God of the united kingdom of Great Britain and Ireland queen, Defender of the Faith &c. To the sheriff of —— greeting:—Command T. bishop of —— and C. D. Esquire, and E. F. clerk, that justly and without delay they permit A. B. to present a fit person to the church of —— in the said county, which is void, and in the gift of the said A. B. as he saith, and whereof he complaineth that the said bishop and C. D. and E. F. unjustly hinder him; and unless they shall do so, and the said A. B. shall give you security that his suit shall be prosecuted, then summon by good summoners the said bishop and C. D. and E. F. that they be before our justices at Westminster on —— * to show wherefore they will not do it, and have you there the names of the summoners and this writ. Witness ourself at Westminster, the —— day of —— in the —— year of our reign.

The sheriff's warrant thereon. (d)

—— to wit. J. W. Esquire, sheriff of the county aforesaid, to O. P., Q. R. &c. jointly and severally, by virtue of her majesty's writ to me

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(a) See *forms* of proceedings collected, Harrison's Index, tit. Ecclesiastical Law. VI. *Quare Impedit*, 1, 2; *The King* v. *Archbishop of York*, 1 Adol. & Ell. 394; 3 Nev. & Man. 453, 841, S. C.

(b) As to the parties to the suit, see Com. Dig. Pleader, 3 I. 1, 2; Sell. Prac. vol. ii. 1st edit. 321; and Lee's Prac. Dict. *Quare Impedit.* If the injury to the plaintiff or the delay arises from the bishop alone, then he only need be named in the writ. But if there be another presentation set up, then the pretended patron and his clerk should also be joined in the action, or it may be brought against the pretended patron and his clerk, leaving out the bishop, or against the patron only, but it is generally advisable to proceed against all three; for if the bishop be left out, and the suit is not determined till six months are past, the bishop is entitled to present by *lapse*, but if he is named and is made a party to the suit, no lapse can possibly accrue till the right is determined; and therefore it is always most advisable to make him a party; Cro. Jac. 93.

If the *patron* be left out, and the writ is only brought against the bishop and the clerk, the suit is of no effect, and the writ shall abate, Hob. 316; for the right of the patron is the principal question in the cause, 7 Rep. 25; and if the clerk is left out and has received institution before the action brought (as is sometimes the case), the *patron* plaintiff, by his suit, may recover the right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit to hear what he can allege against it, for which reasons it is the safer way to insert them all three in the writ.

(c) As to the proceedings and the parties to be made defendants, see Com. Dig. Plead. 3 I. 1, 2; Sell. Prac. *Quare Impedit*, A. vol. ii. 1st ed. 321; and Lee's Prac. Dict. *Quare Impedit*; 6 Bing. 283; and *supra*, note. By an executor, 1 Lutw. 3.

(d) See Sellon's Prac, *Quare Impedit*, vol. ii. 1st edit. 321.

PROCEEDINGS IN QUARE IMPEDIT.

directed, I command you that you or some or one of you command T. bishop of ——, and C. D. Esquire, and E. F. clerk, that justly and without delay they permit A. B. to present a fit person to the church of ——, which is void and in the gift of the said A. B. as he saith, and whereof he complaineth that the said bishop and C. D. and E. F. unjustly hinder him, and unless they shall so do, and the said A. B. shall give you security that his suit shall be prosecuted, then summon by good summoners the said bishop and C. D. and E. F. that they be before her majesty's justices at Westminster, from ——, to show wherefore they will not do it, and that you return the same to me so that I may have there the names of the summoners and this precept. Given, &c. at &c. in, &c.

By the same sheriff.

Form of writ of *ne admittas.* (*e*)

Victoria, by the grace of God of Great Britain and Ireland queen, Defender of the Faith, and so forth, to the Reverend Father in God T. by Divine Providence bishop of ——, greeting:—We prohibit you, that you admit a person to the church of ——, which is void as it is said, and concerning the advowson whereof an action is commenced in our Court of the Bench between A. B. Esq. and you and C. D. Esq., until it shall be discussed in the said Court whether the said advowson belongeth to the said A. B. or to you and the said C. D. Witness ourself at Westminster, the —— day of ——, in the —— year of our reign, &c.

In the Common Pleas.

—— Term, —— Vict.

Common commencement and conclusion of a declaration in a *quare impedit* against bishop, patron and clerk. (*f*)

[*Venue,*] to wit. C. bishop of ——, E. F. [*the pretended patron*] and G. H. [*his clerk*] were summoned to answer A. B. [*the plaintiff*] of a plea that they permit the said [*the plaintiff*] to present a fit person to the church of ——, which is vacant and in his gift; and whereupon the said A. B. by L. his attorney complains, that whereas &c. [*here the plaintiff's right of presentation is deduced and set out, and after stating the vacancy by the death, &c. of the late parson &c., he then, after stating himself to be so seised, proceeds to aver*] that the said church became vacant by the death of the said ——, the last incumbent thereof, and yet is vacant, and by reason thereof it at present belongs to the said A. B. [*the plaintiff*] to present a fit person to the said church being so vacant, and they the said bishop of &c. and E. F. and G. H. unjustly hindered him the said A. B. from presenting a fit person to the said church, whereupon he the said A. B. saith that he is injured, and hath sustained damage to the value of ——, (*g*) and therefore he brings his suit, &c.

Declaration in *quare impedit.* (*h*)

Cumberland, to wit. John, Bishop of C. and James, Earl of L., were summoned to answer A. B. widow, of a plea, that they permit the said A. B.

(*e*) See Sellon's Prac. *Quare Impedit*, vol. ii. 1st ed. 324.

(*f*) See requisites of declaration, Com. Dig. Pleader, 3 I. 3, 4.

(*g*) Damages are given by the Statute Westm. 2, (13 Edw. 1,) c. 5, s. 3.

(*h*) See forms of a declaration in *quare impedit* by the king in a case of simony, *The King* v. *Archbishop of York and others*, 1 Ad. & El. 397 to 401, printed in note, drawn and settled by Mr. Tidd and Mr. Chitty for Messrs. Lowdham, Park and Freeth, Solicitors, Lincoln's Inn Fields; see also 2 Hen. Bla. 259; 1 East, 487; 10 Wentw. 67; Bul. Ni. Pri.

PROCEEDINGS IN QUARE IMPEDIT.

to present a fit person to the rectory of the parish church of K. in the said county of C. which is now vacant, and belongs to her presentation; and whereupon the said A. B. by her attorney, complains that whereas one Sir J. D. Baronet, now deceased, was in his lifetime, to wit, on &c. seised of the manor of K. with its appurtenances, to which manor the advowson of the said rectory with its appurtenances then belonged, in his demesne as of fee, and being so seised thereof as aforesaid, he the said Sir J. D. afterwards, to wit, on &c. at &c. presented to the said church, being then vacant, one E. G. his clerk, who, on the presentation of the said Sir J. D. was admitted, instituted and inducted into the same, in the time of peace, in the time of our sovereign lord George the Second, late king of Great Britain, and being so seised thereof, afterwards, to wit, on &c. at &c. in &c. by a certain indenture of bargain and sale then and there made between the said Sir J. D. (by his name and description therein mentioned) of the one part, and T. M. clerk, (by his name and description therein mentioned), of the other part, (one part of which said indenture, sealed with the seal of the said Sir J. D., the said A. B. now brings here into Court, the date whereof is the day and year last aforesaid), for the consideration therein mentioned, the said J. D. bargained and sold to the said T. M. *the said advowson of the rectory aforesaid, with the rights, members and appurtenances thereof*, to have and to hold the same unto the said T. M. from the day of the date of the said indenture until the full end and term of one year from thence next ensuing and fully to be completed and ended, as by the said indenture more fully appears; by virtue whereof the said T. M. was possessed of the said advowson for the said term, and being so possessed thereof, and the reversion thereof belonging to the said Sir J. D. as aforesaid, he the said Sir J. D. afterwards, to wit, on &c. at &c. in &c. by a certain other indenture then and there made between the said Sir J. D. (by his name &c.) of the one part, and the said T. M. by &c. of the other part, one part of &c. granted and released to the said T. M. his heirs and assigns for ever the reversion of the said advowson of the rectory aforesaid, with the appurtenances, to have and to hold the same unto the said T. M. his heirs and assigns for ever, to the use of the said T. M. his heirs and assigns for ever, as by the said last-mentioned indenture more fully appears; by virtue whereof, and by force of the statute made for transferring uses into possession, he the said T. M. *was seised of and in the said advowson as in gross by itself as of fee and right*, and being so seised thereof, he the said T. M. afterwards, to wit, on &c. at &c. died seised of his estate therein, upon whose death the said advowson of the said rectory descended to one W. M. as the son and heir of the said T. M., whereby the said W. M. was seised of the said advowson of the said rectory as in gross by itself as of fee and right, and the said W. M. being so seised thereof, afterwards, to wit, on &c. by a certain &c. [*here state in like manner a lease and release to plaintiff, and proceed as follows:*] by virtue whereof, and by force of the statute made for transferring uses into possession, she the said A. B. was seised of and in the said reversion of the said advowson of the said rectory as

Seisin in fee of Sir J. D. of manor with advowson appendant, and his presentment of a clerk.

Lease and release of advowson to T. M.

Death of T. M. and descent to W. M. as son and heir.

122; 2 Sel. Prac. 2d edit. 320, and Com. Dig. Pleader, 3 I. 3. 4, as to the requisites of the declaration. The various means of acquiring a title to an advowson are described nearly in the same form as in stating the title to other real property, the forms of which, see *ante*, vol. ii.; see the various forms of declarations, &c. 10 Wentw. 69 to 107, and those referred to in the Index following, page 107.

aforesaid as in gross by itself as of fee and right; and the said A. B. being so seised thereof, the said church afterwards, to wit, on &c. became vacant by the death of the said E. G. whereby it then and there belonged and now belongs to the said A. B. to present a fit person to the said church, so being vacant as aforesaid, but the said bishop and earl will not permit her, but unjustly hinder her, wherefore she the said A. B. saith she is injured and hath sustained damage to the value of £——, and therefore she brings her suit, &c.

Church vacant by death of incumbent, and plaintiff's right to present.

And the said John, Bishop of C. by A. B. his attorney, saith, that the said rectory and parish church of —— is within his diocese of C. and that he hath nothing, nor doth he claim to have any thing in the rectory of the church aforesaid, or in the advowson of the same, except only the admission, institution and induction of the rectors to the same rectory and parish church, and all such other things as belong to the ordinary as ordinary of that place, and this &c.; wherefore &c. if the said A., without assigning some special disturbance in the person of him the said bishop, ought to have or maintain her said action against him, &c.

Plea by bishop, of disclaimer, &c. (i)

And the said James, Earl of L., by A. B. his attorney, says, that the said Sir J. D. deceased, in his lifetime, and before the making of the said indenture of lease and release to the said T. M. in the said declaration mentioned, to wit, on &c. was seised in his demesne as of fee of and in the manor of K. in the county of C. with the appurtenances, to which said manor the said advowson of the said rectory, with the appurtenances, was then appendant, and being so seised as aforesaid, he the said Sir J. D. afterwards, and, whilst he was so seised, to wit, on &c. presented to the same church, the same being then vacant, the said G. G. his clerk, who on the said presentation of the said Sir J. D. was admitted, instituted and inducted into the same, and by virtue of the said presentation remained and continued in the possession of the said church from thence until the same became vacant by his death, as in the said declaration is alleged; and the said Sir J. D. being so seised of the said manor as aforesaid, with the appurtenances, and the said advowson being so appendant to the same as aforesaid, whilst he was so seised, and whilst the said advowson was so appendant as aforesaid, and before the making of the said indenture of bargain and sale and release to the said T. M. in the said declaration mentioned, to wit, on &c. at &c. by a certain indenture of bargain and sale then made between the said Sir J. D. [*by his &c.*] of the one part, and J. W. [*by his &c.*] of the other part, which said indenture is now in the possession of the said A., so that the said Earl cannot bring the same into Court here, he the said Sir J. D., for the said consideration therein mentioned, bargained and sold to the said J. W. the said manor, together with the said advowson of the rectory aforesaid, so being appendant thereto as aforesaid, and all other the appurtenances thereto belonging, to have and to hold &c. [*Here were stated three sets of conveyances of the manor and advowson by lease and release to the Earl, one of the defendants, and the conclusion was as follows:*] as by the last-

Plea by *pseudo patron* of a prior conveyance of the manor and advowson to a person under whom defendant claims.

(i) See forms of pleas, &c. in *Quare Impedit*, 1 East, 418; 10 Went. 68 to 107; and in the following Index; and as to the requisites, Com. Dig. Pleader, 3 I. 7.

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mentioned indenture more fully appears; by virtue whereof, and by force of the statute made for transferring uses into possession, he the said Earl then and there became and was, and from thenceforth hitherto hath been and still is, seised in his demesne as of fee of and in the said manor, and as of fee and of right of and in the said advowson, so being appendant thereto as aforesaid, with the appurtenances, for which reason he the said Earl prevented and at present hinders the said A. from presenting a fit person to the said church. And this &c. wherefore &c. if &c. and he also thereupon prays a writ to the bishop &c.

GILES ROOKE.

Replication to bishop's plea.

And the said A. as to the said plea of the said bishop, (inasmuch as he hath not, nor claimeth to have, any thing in the said church, or in the advowson thereof, except the admission, institution and induction of parsons to the said church, and what other rights belong to an ordinary as ordinary of that place), prays judgment against the said bishop, and a writ to the said bishop &c. therefore it is considered that the said A. recover against the said bishop her presentation to the said church, and that she have a writ to the said bishop, that notwithstanding his disclaimer he admit a fit person to the said church on the presentation of the said A., and the said bishop is not amerced, because he hath excused himself of any particular disturbance, but let execution thereof be stayed until the said plea between the said A. and the said Earl be determined &c.

To plea of *pseudo patron*, denial of prior conveyance.

And the said A. as to the said plea of the said Earl by him above pleaded in bar, says, that by reason of any thing therein alleged, she the said A. ought not to be barred from having and maintaining her aforesaid action against the said Earl, because he as before says, that the said Sir J. D. deceased, in his lifetime, and before the presentation of the said G. G. to the church aforesaid, by the said Sir J. D. in the said declaration of the said A. mentioned, was seised of the said manor of K. with its appurtenances, to which manor the advowson of the said rectory then belonged in his demesne as of fee; and being so seised of the said manor, with the advowson appendant thereto, he the said Sir J. D. bargained and sold the said advowson to the said T. M. his heirs and assigns for ever, in manner and form as the said A. hath in her said declaration above alleged; without this, that the said Sir J. D. bargained and sold the said manor, with the appurtenances, and granted or released the reversion thereof to the said J. W. in manner and form as the said Earl hath in his said plea above alleged. And this &c. wherefore inasmuch as the said earl hath above acknowledged that he hath hindered, and still doth hinder the said A. from presenting to the said church, the said A. prays judgment and her damages by reason of the said hindrance, together with a writ to the bishop, to be adjudged &c.

Traverse of grant of manor.

C. RUNNINGTON.

Rejoinder.

And as to the said plea of the said A. by her above pleaded, by way of reply to the said plea of the said Earl by him above pleaded in bar, he the said Earl says as before, that the said Sir J. D. bargained and sold the said manor, with the appurtenances, and granted and released the reversion thereof to the said J. W. in manner and form as the said Earl hath above in

his said plea alleged; without this, that the said Sir J. D. being so seised of the said manor, with the said advowson appendant thereto as aforesaid, remained and continued so seised of the said manor, with the advowson appendant thereto, until the said Sir J. D. bargained and sold the said advowson to the said T. M. his heirs and assigns for ever, as the said A. hath in her said declaration above alleged. And this &c. wherefore &c. if &c. and that he may have a writ to the bishop, &c.

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Traverse that Sir J. D. continued seised of manor, till &c. (*k*)

GILES ROOKE.

And the said Earl says nothing in bar or preclusion of the said action or in bar or preclusion of the said plea of the said A. by her above by way of reply pleaded to the plea of the said Earl by him above pleaded in bar, but departs in contempt of the Court, whereby the said A. remains therein undefended against the said Earl; therefore it is considered that the said A. do recover against the said earl her presentation to the rectory aforesaid, and that she have a writ to the bishop of C. the ordinary of the said rectory, that he, notwithstanding his disclaimer, or the claim of the said Earl, do, on the presentation of the said A., admit a fit person to the rectory aforesaid &c. and the said Earl be in mercy &c.; but because it is unknown whether the said church is still vacant, and whether six months have passed since the death of the said G. G. and what is the value of the said church by the year; therefore it is commanded to the sheriff of the said county of C. that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire whether the said church is vacant or not, and if it is not vacant, upon whose presentation it is full, and whether the space of six months has elapsed since the death of the said G. G. and what is the value of the said church by the year, according to the true value thereof, and that the inquisition that he shall therefore take he make appear under his seal and the seals of those by whose oath he shall make such inquisition, to the justices of our said lady the queen at Westminster, on ——, and that he have there the writ of our said lady the queen to him in that behalf to be directed, and in the mean time let the execution of the writ to the bishop cease.

Judgment by *nil dicit* against defendant. (*l*)

Writ to the bishop.

Writ of inquiry of three usual points, and *cesset executio* as to the bishop.

Victoria, by the grace of God of Great Britain and Ireland queen, defender of the faith, and so forth, to the Reverend Father in God, T. by Divine permission, bishop of ——, greeting: Whereas A. B. hath lately in our Court before our justices of the Bench, at Westminster, by the consideration of the same Court, recovered against you and E. F. clerk, and C. D. his presentation to the rectory and parish church of —— in our county of ——, and your diocese, which became vacant and belongs to his presentation; and whereupon it was considered by our said Court of the Bench, that the said A. B. should have our writ to you the said bishop, the ordinary of that place, to be directed, and notwithstanding your disclaimer and the claims of the said E. F. and C. D. or either of them, you should admit a fit person to the rectory and parish church aforesaid at the presentation of the said A. B., we therefore command you, that notwithstanding your disclaimer, or the

Form of the writ *ad admittendum clericum*. (*m*)

(*k*) See a plea of simony, &c. 6 Bing. 2.

(*l*) As to the judgment in *Quare Impedit*, see Com. Dig. Pleader, 3 I. 11. As to the writ of inquiry, see Tidd's Prac. 9th edit. 575.

(*m*) See forms, Sellon's Prac. *Quare Impedit*, vol. ii. 1st edit. 331; Lee's Prac. Dict. *Quare Impedit*.

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claims of the said E. F. and C. D. you admit a fit person to the rectory and parish church aforesaid at the presentation of the said A. B., and how you shall have executed this our writ certify to us on ——, wheresoever we shall then be in England. Witness, Sir J. E. Knight, at Westminster, the —— day of ——, in the —— year of our reign, &c.

Writ of error in *quare impedit* following.

Yorkshire, to wit. Our lord the king hath commanded his trusty and well-beloved Sir John Willes, Knight, his chief justice of the Bench, by his close writ in these words:—George the Second, by the grace of God of Great Britain and Ireland king, defender of the faith, &c. to his trusty and well-beloved Sir John Willes, Knight, his chief justice of the Bench, greeting: Forasmuch as in the record and process, and also in giving of judgment, in a plaint which was in Court before you and your associates, our judges of the Bench, between us and Thomas, Archbishop of York, Charles Hayes, Esquire, and George Barber, Clerk; for that the said Thomas, late Archbishop of York, now Archbishop of Canterbury, Charles and George hinder us to present a fit person to the church of Ryther, otherwise Ryder, which is void, and in our gift, as it is said manifest error hath intervened to the great damage of us, whereof we complain; we, willing that the said error (if any be) be duly amended, and full and speedy justice done to the said parties in this behalf, do command you, that if judgment be given thereupon, then you send to us distinctly and plainly under your seal the record and process of the said plaint with all things touching the same, so that we may have them from the day of St. Michael in three weeks, wheresoever we shall then be in England, that inspecting the record and process aforesaid we may cause further to be done thereupon for amending the said error as of right and according to the law and custom of England shall be meet to be done. Witness, Thomas, Archbishop of Canterbury, and other guardians and justices of the kingdom, at Westminster, the —— day of ——, in the —— year of our reign. KING.

The answer of Sir John Willes, Knight, chief justice within-named. The record and process of the plaint within-mentioned, with all things touching the same, I send before our lord the king, wheresoever &c. at the day within contained in a certain record to this writ annexed, as I am within commanded. JOHN WILLES.

XLIII. PROCEEDINGS IN DOWER.

Præcipe for writ of dower. (*a*)

Essex, to wit. Command C. D. that justly and without delay he render to A. B. widow, who was the wife of E. B. her reasonable dower, which falleth to her out of the freehold which was of the said E. B. late her husband, in the parish of E. [*or* " parishes of E. F. and G."] whereof she has nothing as she says.

Returnable on ——.

Writ of dower. (*b*)

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland queen, defender of the faith, to the sheriff of [Essex] greeting: Command C. D. that justly and without delay he render to A. B. widow, who was the wife (*c*) of E. B. now deceased, her reasonable dower, which falleth to her of the freehold, which was of the said E. B. her late husband, in the parish of E. [*or* " parishes of E. F. and G."] whereof she hath nothing as she says, and whereof she complains that the said C. D. deforceth her, and unless he shall do so, and if the said A. B. shall give you security to prosecute her claim, then summon by good summoners the said C. D. that he be before our justices of the Bench, at Westminster, on &c. [*a general return day,*] to show wherefore he hath not done it, and have there the summoners and this writ. Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

Pledges to prosecute, { John Doe and Richard Roe.

Summoners, John Venn and Richard Fenn.

John Herbert, Esq., Sheriff.

(*a*) See form and directions, 2 Saund. 43, note 1; 2 Sell. Prac. 1st edit. 294; 2d edit. 202; and Com. Dig. Pleader, 2 Y. 1.

(*b*) Booth, 66; Fitz. Nat. Brev. 9th edit. 148. See the forms in 2 Saund. 43, and 10 Wentw. 157.

(*c*) It is said to be necessary to insert these words, and where the writ was:—" *Command A. that &c. he renders to E. F. her reasonable dower, which falleth to her of the freehold, which was of B. F. late her husband,*" &c. an objection was taken to the writ, because it was not " *Command A. that &c. he render to E. F. who was the wife of B. F.*" &c. for she ought to be named wife of B. F. in the beginning of the writ, it being the name by which she has any claim to dower, the Court held the objection fatal, and that the omission was not supplied by the subsequent words, " *of B. F. her husband,*" &c.; Cro. Jac. 217; 2 Saund. 43, note 1. The writ of dower should be brought against all the tenants of the freehold, *i. e.* the persons claiming a freehold interest, and not mere tenants having a chattel interest. It is issued by the cursitor. The first process thereon is a summons by the sheriff or his officers, which may be either served upon the tenants personally, or left at their houses or lands demanded by the writ. In the latter case, it is usual to set up a white stick or wand upon the premises; and by statute 31 Eliz. c. 3, proclamation must have been made at the door of the parish church on Sunday, fourteen days at least before the return of the writ; but now see 1 Vict. c. 45, s. 2, which requires the proclamation to be reduced into writing, and to be affixed on or near to the door of the church. The tenants being summoned, either cast an essoin, or appear, or make default. If they cast an essoin, the demandant must adjourn it till the fourth return after. If they appear at the return of the writ of summons, or upon the adjournment of the essoin, the demandant then counts. But if they make default, a grand cape issues to seize the lands, and warn the tenants to appear to excuse their default, which, if they do, or the demandant release it, he shall count; but otherwise he shall have final judgment; 2 Saund. 43, note 1.

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Writ of dower where the widow has married again. (*d*)

Victoria, &c. to the sheriff of [Yorkshire] greeting:—Command T. P. that justly and without delay he render to A. B. and M. his wife [which said M. was formerly the wife of G. H. deceased], the reasonable dower of her the said M. which belongs to her of the freehold tenements which were of the said G. H. formerly her husband, at S. in your county, whereof she hath nothing as they say, and whereof they complain that the said T. P. doth unjustly deforce them, and unless &c.

Warrant of sheriff thereon. (*e*)

J. W. Esquire, sheriff of [Essex], to M. N. and O. P., my bailiffs for this time only, greeting:—By virtue of a writ of dower of our lady the queen *Unde nihil habet* to me directed, I command you, that you command C. D. that justly and without delay he render to A. B. who was the wife of E. B. her reasonable dower, which &c. [*as in the writ*] deforceth her; and unless he shall do it, then summon the said A. B. that he be before our justices at Westminster, on —— to show wherefore he will not do it, and that after the said summons is made, you do cause proclamation thereof to be reduced into writing, and copies of such proclamation, either in writing or print, or partly in writing and partly in print, to be affixed on or near to the doors of all churches and chapels within the parish of E. previously to the commencement of divine service, according to the form of the statute (*f*) in such case made and provided. Given under the seal of my office &c.

Summons thereon. (*g*)

By virtue of her majesty's writ of dower *Unde nihil habet* to the sheriff of [Essex] directed, and by virtue of the said sheriff's warrant to us directed, we do hereby require and command you, that you render to A. B. &c. [*as in the writ*] as she alleges and complains that you the said C. D. keep her out of the same, and if you refuse so to do, then we do hereby summon you that you be and appear before her majesty's justices at Westminster on ——, to show cause why you do not.

Received 2nd September 1844.

Pledges of prosecution, { John Doe and Richard Roe.

Summoners of the within-named A. B. { T. N. and J. S.

Sheriff's return to writ of dower. (*h*)

And after the aforesaid summons made, to wit, on or near to the doors of all churches and chapels within the parish of E. within specified, within

(*d*) This writ was framed by a very eminent pleader; see another form, Booth, 166.

(*e*) See form, 2 Saund. 43, note 1.

(*f*) See 31 Eliz. c. 3, s. 2, and 1 Vict. c. 45.

(*g*) See form, 2 Saund. 43, note 1; 2 Sel. Prac. 1st ed. 295; 2d ed. 203; and 1 Taunt. 415.

(*h*) See form, 2 Saund. 43, note 1; 2 Sel. Prac. 1st ed. 295; 2d ed. 203; and *Furnis* v. *Waterhouse*, 1 Mod. 197. It must appear on the return, that the land lies within the parish where the proclamation of the summons was made, and that the proclamation was made after the summons; *ibid.* Where the lands lie in several parishes or townships, it seems that a proclamation made at the church or chapel door of one parish or township was sufficient within the act, 31 Eliz. c. 3, s. 2; Hob. 133. But a return that the sheriff had proclaimed "the contents of the writ," is insufficient, because he must proclaim that he made summons on the land; *ibid.* However, according to the modern practice, it seems sufficient to return "that he the sheriff made proclamation of the said summons according to the form of the statute, &c." On the return

which the tenements within mentioned do lie, upon the Lord's day, to wit, the —— day of ——, in the year of our Lord ——, previously to the commencement of divine service, I made proclamation of the aforesaid summons according to the form of the statute in such case made and provided.

J. W. Esq. Sheriff.

Grand cape. (*i*)

Victoria, &c. take into our hand by the view of good and lawful men of your county, the third part of [two messuages, one hundred acres of land, ten acres of meadow, and five acres of wood, with the appurtenances] in the parish of E. in your county, which A. B., in our Court before our justices at Westminster, claims as the dower of her the said A. B. of the endowment of J. B. her late husband, against C. D. by our writ of dower *Unde nihil habet*, for the default of him the said C. D., and the day of the taking thereof make known to our justices at Westminster by your letters under seal, and summon by good summoners the said C. D. that he be before our justices at Westminster on —— to answer and show wherefore he was not before our justices at Westminster on ——, according as he was summoned [*but when the default is for not appearing on the adjournment day of the essoin, then say*, " wherefore he did not keep the day given him by reason of his essoin,"] before our justices at Westminster on —— last past, and have there the names of those by whose view you shall do this, and this writ. (*k*) Witness, —— Lord ——, at Westminster, the —— day of —— in the —— year of our reign.

Return of sheriff. (*l*)

By virtue of this writ to me directed on the —— day of —— in the year within written, I have taken into the hands of our lady the queen, by the view of O. P. and Q. R., good and lawful men of my county, the third part of the lands and tenements within mentioned, with the appurtenances, as I am within commanded, and I have by T. N. and J. S. given notice to the within mentioned A. B. to be and appear (*m*) before her majesty's justices at Westminster at the time and place within mentioned, as I am also within commanded. Summoners of the within named A. B., T. N. and J. S.

J. W. Esq. Sheriff.

Plaint or count in dower. (*n*)

Essex, to wit. A. B. widow, who was the wife of E. B. Esq. deceased, by ——, her attorney, demands against C. D. the third part of [ten messuages, ten barns, ten stables, four gardens, four orchards, one water corn-

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of the summons, the tenant is entitled to an *essoin*, which is entered in the office of the clerk of the essoins of the C. B. upon the day of such return; but it cannot be entered as if made by *attorney*, for it is inconsistent to say, that a man *has a legal excuse* for *not* appearing when he does really appear by attorney; 2 Wils. 164.

(*i*) See 2 Saund. 43, note 1; 10 Wentw. 216, 287; 2 Sel. Prac. 1st ed. 295, 296; 2d ed. 203; and Com. Dig. Pleader, 2 Y. 1.

(*k*) If the sheriff do not return the writ, the demandant may sue out an *alias grand cape* at the return of the first writ; the form of the entry of *grand cape* and *alias*, when the tenant makes default at the return of the mmons, is in Rast. Ent. 239 a, pl. 4.

(*l*) See 2 Saund. 43, note 1; and 2 Sel. Prac. 1st ed. 296; 2d ed. 204.

(*m*) If the tenant neglect to appear on the return of the *grand cape*, the demandant is strictly entitled to judgment of seisin and to an award of writ of inquiry of damages; but if the tenant appear on the return of the *grand cape*, the demandant, instead of insisting upon final judgment against the tenant for his default to the summons, may waive the default, and take an appearance upon the *grand cape*, and so in *petit cape*; 1 Salk. 216, 217; 6 Mod. 4; 2 Saund. 43, note 1.

(*n*) See forms, 2 Wils. 118; Morg. Prec. 582; 2 Saund. 44, 329; Booth, 118, 166; Lil. Ent. 189; 10 Wentw. 157; 10 Wentw. Index, 164, 165; Com. Dig. Pleader, 2 Y. 2.

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mill, two thousand acres of land, two hundred acres of meadow, two thousand acres of pasture, two thousand acres of manor, and two hundred acres of wood land] with the appurtenances, in the parish of ——, in the county of Essex, as the dower of the said A. B. of the endowment of the said E. B. deceased, heretofore her husband, whereof she hath nothing &c.

The like by wife and her second husband.

Yorkshire, to wit. M. F. and M. his wife (which said M. was formerly the wife of G. S. deceased), by ——, their attorney, demand against T. P. the third part of [one undivided moiety of fourteen messuages, fourteen out-houses, fourteen yards, fourteen gardens, and two acres of land, with the appurtenances, at —— in the county of York, as the reasonable dower of the said M. by the endowment of the said T. P., formerly her husband, by the writ of our lady the now queen of dower, whereof she hath nothing &c.

The like by an infant. (*o*)

Breconshire (Ss.). S. W. widow, who was the wife of T. W. by L. L. and H. M. who are admitted by the Court of our lady the queen here to prosecute for the said S. who is within age, as her next friends, demands against J. W. a (*p*) third part of [the manor of C. and R. and of fourteen messuages, two water corn-grist mills, five hundred acres of land, sixty acres of meadow, one hundred acres of pasture, one hundred acres of wood, two hundred acres of furze and heath,] with the appurtenances and [eighty shillings of rent in L., B. and C.] as her dower of the endowment of the said T. her late husband &c.

Plea by defendant by guardian that he was always ready to render dower. (*q*)

And the said W. by H. B., who is admitted by the Court of the queen here to defend in this behalf for the said W., who is under the age of twenty-one years, as the guardian of the said W. cometh and saith, that from the death of the said J. late husband of the said M. he hath been always ready, and still is ready, to render to the said M. her dower of the said tenements and premises, with the appurtenances, and rendereth the same here in Court to the said M.

Plea of tender of dower.

See form of plea of tender of dower in a writ of dower, *Jones* v. *Jones*, 2 Tyr. Rep. 531.

Plea of *ne unques seisie que* dower. (*r*)

And the said C. D. by —— his attorney, comes and says, that the said A. B. ought not to have her dower of the manors, tenements and rents

(*o*) See forms, 2 Saund. 44, 329.

(*p*) After the demandant has counted, it is held in many cases that the tenant may pray a view; Co. Ent. 177 a; Rast. Ent. 228 b, 232 b, 239 b; Clift. Ent. 299; *Whelpdale* v. *Whelpdale*, 3 Lev. 169; *Barnes* v. *Rich*, 3 Lev. 220. But Dyer, 179 a, pl. 41; 2 Inst. 481; 3 Fitz. View, 55; *Astenal* v. *Astenal*, 2 Lev. 117, are to the contrary. It is probable that the strong inclination of the Court would be to discountenance, if not disallow the plea being dilatory, as it necessarily occasions great delay in a demand much favoured in law, and the widow is in the meantime without any support; 2 Saund. 44, note 3.

(*q*) See form, 2 Tyr. 531; 1 Rich. Prec. C. P. 4th ed. 437, 438, and proceedings thereon. As to the use of this plea, see 2 Sel. Prec. 2d ed. 210; Co. Lit. 32.

(*r*) See 2 Saund. 329; 1 Rich. Prec. C. P. 4th ed. 440; 2 Wils. 118; Morg. Prec. 582, 583, 584; 10 Went. 159, 160; Booth, 167; Rast. Ent. 230 a, s. 10, Dower; Co. Ent. 176 a, Dower; Hearn, 340, Dower; Rob. Ent. 237; 1 Bro. Ent. 203; Clift. Ent. 203, pl. 12. Proof by demandant that her deceased husband was in receipt of rents and profits, is *prima facie* evidence of a sufficient seisin; 10 Wentw. 160, 161; see other pleas, 2 Saund. 44, 45, note 1; Booth, 167, &c.; 10 Wentw. Index, 164, 166.

aforesaid, with the appurtenances and advowsons aforesaid, of the endowment of the said E. B. heretofore her husband, because he says that the said E. B. heretofore her husband, was not either on the day on which he married the said A. B. or ever after seised of such estate of and in the said manors, tenements and rents, with the appurtenances and advowsons aforesaid, whereof &c. that he could endow the said A. B. thereof, and of this he puts himself upon the country, and the said A. B. doth the like. Therefore, &c.

Plea *ne unques accouple.* (*s*)

And the said C. D. by —— his attorney, comes and says, that the said A. B. ought not to have her dower in this behalf, as having been the wife of the said E. B. deceased, because he says, that the said A. B. never was accoupled to the said E. B. deceased in lawful matrimony. And this the said C. D. is ready to verify; and therefore he prays judgment if the said A. B. ought to have her dower of the messuages and tenements aforesaid, with the appurtenances.

Replication that they were lawfully married in England. (*t*)

And the said A. B. by the said —— her attorney aforesaid, says, that she ought not by any thing in the plea of the said C. D. above alleged to be barred from having her aforesaid dower in this behalf, because she says, that she the said A. B. on the &c. at ——, in the county of ——, in the parish church of ——, to wit, at &c. aforesaid, was accoupled to the said E. B. deceased in lawful matrimony. And this she is ready to verify when, where and in such manner as the Court here shall consider, &c.

The like where marriage took place in Scotland. (*u*)

And the said A. B. by the said —— her attorney aforesaid, says, that she ought not by any thing in the plea of the said C. D. above alleged to be barred from having her aforesaid dower in this behalf, because she says, that she the said A. B. on &c. was accoupled to the said E. B. deceased in lawful matrimony at Edinburgh, in that part of Great Britain called Scotland. And this she prays may be inquired of by the country.

Plea that wife eloped from her husband, and lived in adultery with her present husband. (*x*)

And the said C. D. by —— his attorney, comes and says, that the said A. B. and E. his wife ought not to have the dower of the said E. of the said one undivided moiety of the said tenements and premises in the said decla-

(*s*) See form, 2 Wils. 118; Morg. 582; 10 Wentw. Prec. 158; 2 H. Bla. 145; see the law and forms of pleas and certificate referred to in 2 Saund. 44, 45, note 1; Rast. Ent. 228 a, 228 b; Co. Ent. 180 a, b; Rob. Ent. 240; 1 Bro. Ent. 204.

(*t*) See 10 Wentw. Prec. 158; 2 Rast. Ent. 228; Co. Ent. 180; 2 Saund. 44, 45, in notes. The record proceeds in the following manner:—"and because the cognizance of causes of this kind belongeth to the Ecclesiastical Court, therefore it is commanded to ——, bishop of ——, the diocesan of the said place, that he, convening before him those who ought to be convened in this behalf, do diligently inquire into the truth of the fact, and what he shall find thereon he shall make appear here to our justices at Westminster by his letters-patent and writ close." Then follows the writ to the bishop, reciting the pleadings and issue, and the parish church where the espousals are alleged to have taken place; 2 H. Bla. 149.

(*u*) See 10 Wentw. 158; Rast. Ent. 228; Co. Ent. 180. This replication was demurred to on three grounds; first, because a marriage in Scotland did not entitle the demandant to dower; secondly, because no place in England was alleged for a venue; and thirdly, because it concluded to the country; but the replication was held sufficient; the first point was given up, and the two others were decided against the defendant; and it was held that a marriage in a foreign country was properly triable by a jury; *Ilderton* v. *Ilderton*, 2 H. Bla. 145; 2 Saund. 44, 45, in notes; 5 East, 473.

(*x*) See Rast. Ent. 230, s. 9; Rob. Ent. 260; 1 Bro. Ent. 204; 2 Saund. 44, 45, in notes; and see form in 6 Bing. 135.

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ration mentioned, with the appurtenances, by the endowment of the said F. formerly her husband, because he the said C. D. says, that the said E. heretofore and in the lifetime of the said F. and during her coverture with and whilst she was the wife of the said F., to wit, on &c. at &c. of her own accord and without the license or consent and against the will of the said F. eloped from and left him the said F. her said husband, and thereupon then and there and continually afterwards lived in adultery with the said A. B. during the whole life of the said F. to wit, at &c. aforesaid; and the said C. D. further in fact says, that the said F. in his lifetime was not at any time after the said E. so as aforesaid eloped from the said F., or whilst or after the said E. eloped and lived from the said F. in adultery with the said A. B., voluntarily or in any manner reconciled to the said E. (y) And this he the said C. D. is ready to verify; wherefore he prays judgment if the said A. B. and E. ought to have the dower of the said E. of the said undivided moiety of the said tenements and premises in the said declaration mentioned, with the appurtenances, by the endowment of the said F. formerly her husband, &c.

Replication that she did not elope. (z)

And the said A. B. and E. his wife, as to the said plea of the said C. D. say, that they by reason of any thing by the said C. D. in that plea above alleged, ought not to be barred from having her dower of the said E. of the said one undivided moiety of the said tenements and premises in the said declaration mentioned, with the appurtenances, by the endowment of the said F. formerly her husband, because they say, that she the said E. in the lifetime of the said F. did not elope from the said F. her said husband, nor live from him the said F. in adultery with the said A. B. in manner and form as the said C. D. hath above in his said plea in that behalf alleged. And this they pray may be inquired of by the country, &c.

Plea of election by widow to take an annuity secured to her by deed in lieu of dower.

See form of plea and replication and law, *Slatter* v. *Slatter*, 5 Moore & Scott, 83, note (*a*).

Pleas by defendant as to part, sole tenancy; to the second part *ne unques seisie que* dower; to the residue, plea of non-tenure, and proceedings thereon. (*a*)

J. H. ats. J. C. } (Ss.) And the said J. H. by W. G. his attorney, comes, and as to one acre of land, with the appurtenances, in the parish of W. aforesaid, part of the said thirty acres of land in the said demand of the said A. mentioned, and whereof &c. and also as to one acre and the half of another acre of meadow, with the appurtenances, in W. aforesaid, part of the said thirty acres of meadow in the said demand of the said A. mentioned, and whereof &c. says, that he the said J. H. on the day of suing forth the original writ of the said A. and before, was and from thence hitherto hath been and still is sole tenant of the said one acre of land, and one acre and an half of meadow, parcel &c. without this, that the said G. T. on the day of suing forth the original writ of the said A. or at any time since, had any thing in the said one acre of land, and one acre and an half of meadow, parcel &c. with the appurtenances.

(y) This allegation seems unnecessary, as a reconciliation must be replied if relied on; 2 Saund. 45, note 1.

(z) Rast. Ent. 230; 2 Saund. 45, n. 1.

(*a*) See Morg. Prec. 583.

Second plea.

And the said J. H. by leave &c. further says, that the said A. ought not to have her dower thereof, or of any part thereof, of the endowment of the said J. C. heretofore her husband, because he says, that the said J. C. heretofore the husband of the said A. neither on the day on which he espoused the said A. or at any time afterwards was seised of the said one acre of land, and one acre and an half of meadow, with the appurtenances, or of any part thereof, of such an estate whereby he could endow the said A. thereof. And this he is ready to verify, &c.

Third plea.

And as to the residue of the said lands and tenements mentioned in the said demand of the said A. and whereof &c. he the said J. H. says, that the said J. H. cannot render to the said A. her dower thereof, or any part thereof; because he saith, that he the said J. H. is not, nor on the day of suing forth the original writ of the said A. or at any time since has been tenant thereof, or of any part thereof, as of freehold, either solely or jointly with the said G. T. And this he is ready to verify; wherefore as to the said residue of the said lands and tenements, he prays judgment of the said writ, &c.

Upon these pleas Mr. Warren gave the following opinion:—

"As there is in this case a separate tenancy, there ought to be separate actions, and defendants having severally pleaded non-tenancy, I think this action ought to be discontinued, and new ones brought against each respective tenant."

Issue, &c. in dower.

To save the trouble of beginning anew, Mr. H.'s attorney consented to alter his plea, and the attornies being agreed, Mr. W. drew the following issue, &c.

First, the declaration.
Then the plea of defendant T.

And the said J. H. by W. G. his attorney, comes and says, that he is not, nor on the day of suing out the original writ of the said A. or at any time after, either jointly with the said G. T. or solely, tenant of the said premises in the said demand of the said A. mentioned, or of any part thereof. And this he is ready to verify; wherefore he prays judgment of the said writ, and that the same, as to him the said J. H. be quashed, &c.

And the said A. says, that she cannot deny the matters contained in the said plea of the said J. H., but admits the same to be true; therefore it is considered by the justices here, that the said writ, as to the said J. H. be quashed, &c. and the said A. as to the said plea of the said G. T. above lastly pleaded in bar, says, that she, by any thing therein alleged, ought not to be barred from recovering of her dower in this behalf against the said G. because she says, that she the said A. at A. in the county of B. at and in the parish church of A. aforesaid, in the lifetime of the said J. to wit, on &c. was coupled with the said J. in lawful matrimony. And this she is ready to verify, where, when and in what manner this Court here shall direct &c. and because the cognizance of this matter wholly belongs to the Eccle-

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siastical Court, therefore C. D. by Divine permission bishop of E. F. diocesan of that place, is commanded, that calling together before him such as in this behalf ought to be called, he diligently inquire the truth of the premises, and what he shall have found by such inquiry he make appear to her majesty's justices here, in three weeks from the day of the Holy Trinity, by his letters patent and writ close: and as to the trial of the issue above joined between the said parties to be tried by the country the sheriff is commanded that he cause to come here in three weeks from the day of the Holy Trinity, twelve, &c. by whom &c. and who neither &c. to recognize &c. because as well &c. the same day is given to the said parties here &c.

Form of issue, &c. in dower.

See form of issue, award of *venire jurata*, respite of jury, and other proceedings. 2 Saund. 330, 331; 10 Wentw. 159, 160; 2 Saund. 45, in the notes.

Postea, finding that the husband died seised, and stating the value of the estate, and finding damages and costs. (*b*)

Afterwards, that is to say, on the day and at the place within mentioned, before ——, chief justice of our lady the queen of the bench, and Sir ——, one other of the justices of our said lady the queen of the bench, justices of our said lady the queen, assigned to take the assizes in the county of ——, according to the form of the statute &c. come as well the within-mentioned F. D. widow, as the within-named B. D. by her attorney within-mentioned, and the jurors of the jury, whereof mention is within made, being summoned, some of them, that is to say, J. B., J. G. junior, J. G., E. O., R. H., J. F., W. W. and W. J. come and are sworn upon that jury; and because the

Tales.

residue of the jurors of the same jury do not appear, therefore others of the bye-standers being chosen by the sheriff of the county aforesaid, at the request of the said F. D. and by the command of the said justices, are appointed anew, whose names are annexed to the within written panel, according to the form of the statute in such case made and provided; which said jurors so appointed anew, that is to say, H. A., R. K., J. M., and G. W. being called likewise come, who together with the said other jurors before impannelled and sworn, being chosen, tried and sworn to speak the truth of the matters within contained, say, upon their oath, that the within-named E. D. heretofore the husband of the said F. D. was, on the day in which he married the said F. D. and after, seised of such estate of and in the within-mentioned manors, tenements and rents, with the appurtenances and advowson within-mentioned, that he could endow the said F. D. thereof as the said F. D. has within alleged. And the jurors aforesaid, upon their oath aforesaid, further say, that the said E. D. being so as aforesaid seised of such estate of and in the within-mentioned manors, tenements and rents, with the appurtenances and advowson aforesaid, died so seised thereof on the —— day of ——, in the —— year of the reign &c. and that the said manors, tenements and rents aforesaid, with the appurtenances and advowson aforesaid, are worth by the year in all issues besides reprises £——, and they

(*b*) See forms, 2 Saund. 331. See another form finding as to part, that the deceased husband was seised at the time of the marriage, but not that he died seised, and as to the residue of the tenements, that the husband was not seised at any time during the coverture; 10 Wentw. 160. As to the recovery of damages and costs in general, see 2 Saund. 45, in note; 2 Sel. Prac. 1st edit. 303, 304; 2d edit. 209, 210.

assess the damages of the said F. D. on occasion of the detention of her said dower, over and above the said value, and over and above her costs and charges by her about her suit in this behalf expended, to £——, and for those costs and charges to 40*s*. Therefore &c.

To the end of the postea, as supra, and then proceed as follows:] Therefore it is considered, that the said A. B. do recover against the said C. D. as well her seisin of a third part of the said manors, tenements and rents, with the appurtenances, and of the advowson aforesaid, to hold to her in severalty by metes and bounds, to the value of a third part of the said manors, tenements and rents, with the appurtenances and advowson aforesaid, from the time of the death of the said E. B. heretofore her husband, which said value, from the time of the death of the said E. B. heretofore her husband, amounts to £475, and her damages aforesaid to £14, by the jurors aforesaid, in form aforesaid assessed, and also £41 for her said costs and charges by the Court here adjudged of increase to the said A. B. and with her assent, which said value and damages in the whole amount to £580, and the said B. in mercy &c. (*d*) whereof £48 : 10*s*. are assigned to T. R. Esq. clerk of our lady the queen.

Judgment after verdict to recover seisin of a third part of the premises, and for damages found by jury, and costs. (*c*).

Therefore it is considered that the said S. do recover against the said J. her seisin of the said third part of the said three messuages, two workhouses, one garden and two back sides, with the appurtenances, parcel of the tenements within specified, whereof &c. to hold to her in severalty by metes and bounds, and the said J. in mercy &c. and hereupon the said S. prays a writ of our lady the queen to be directed to the sheriff of the county aforesaid, to cause her to have full seisin of the said third part of the said three messuages, two workhouses, one garden and two back sides, with the appurtenances, parcel &c. and it is granted to her, returnable here on &c.

Judgment after verdict for demandant for seisin, where no damages were found by jury. (*e*)

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland queen, defender of the faith. To the sheriff of Essex, greeting: —Whereas A. B. widow, who was the wife of E. B. deceased, hath lately in our Court, before Sir J. E. Knt. and his companions, our justices of the bench at Westminster, by our writ of dower, whereof she hath nothing, and by the judgment of the said Court recovered against C. D. her seisin of the third part of [three messuages, two workhouses, one garden and two back sides] with the appurtenances, in the parish of ——, in your county, as the dower of her the said A. B. of the endowment of the said E. B. her late husband, whereof the said C. D. is convicted, as by the record and proceedings thereof remaining in our said Court of the Bench at Westminster aforesaid more fully appears. Therefore we command you, that you, without delay, deliver to the said A. B. seisin of the said third part of the said three

Writ of *habere facias seisinam* of the dower, recovered by verdict, without damages. (*f*)

(*c*) See form, 2 Saund. 43, in notes, and 332. As to the judgment in dower in general, see Com. Dig. Pleader, 2 Y. 19; 2 Sel. Prac. 1st edit. 301; 2d edit. 207 to 212.

(*d*) See 2 Bro. C. C. 620.

(*e*) See form, 10 Went. 161, and Sel. Prac. 1st ed. 303; 2d ed. 209; Com. Dig. Pleader, 2 Y. 19.

(*f*) See form, 10 Wentw. 161; Lil. Ent. 598. If damages and costs have been recovered, the writ may also direct the sheriff to levy them, as in writs of *habere facias possessionem* in ejectment, see Tidd's Forms, 4th edit. 760, 761, 762. See form of writ of *capias ad satisfaciendum* for damages in dower, Lil. Ent. 545.

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messuages, two workhouses, one garden and two back sides, with the appurtenances, to hold to her in severalty by metes and bounds, according to the force, form and effect of the said recovery, and how you shall execute this our writ certify to our justices at Westminster on ——, returning to us this our writ. Witness &c.

Entry of judgment by default, suggestion that husband died seised; award of writ of seisin and inquiry of damages and sheriff's return, and final judgment thereon. (g)

And the said C. D. by —— his attorney, comes and says nothing in bar or preclusion of the said action of the said A. B. whereby the said A. B. remains undefended therein against the said C. D. Therefore it is considered that the said A. B. recover against the said C. D. her seisin of the third part above demanded with the appurtenances, to be held by her in severalty by metes and bounds, and the said C. D. in mercy, &c. And thereupon the said A. B. says, that E. B her late husband, on &c. died seised of the tenements aforesaid with the appurtenances in his demesne as of fee, and prays a writ of our said lady the queen to be directed to the sheriff of the said county of B. as well to give her full seisin of the third part aforesaid with the appurtenances, to be held by her in severalty by metes and bounds, as to inquire of the damages, and it is granted to her returnable here on &c. At which day here comes the said A. B. by her said attorney, and the said sheriff, to wit, J. W. Esq. now returns that he by virtue of the said writ to him directed, on the —— day of —— last past did cause the said A. B. to have full seisin of the third part of the tenements aforesaid with the appurtenances, that is to say, of one messuage &c. [*Here describe the premises delivered by the sheriff to the demandant, and in whose occupation they are, according to the description of the recital*] to hold the same to the said A. B. in severalty by metes and bounds, for and in the name of the whole dowry of the said A. B. of the tenements aforesaid with the appurtenances, happening to her by the death of the said E. B. her late husband, as by the said writ he was commanded &c. The said sheriff also returns here a certain inquisition taken before him at the house of ——, at —— in the said county, the —— day of —— last past, by the oath of twelve &c. by virtue of the writ aforesaid taken, by which it is found that the said E. B. heretofore the husband of the said A. B. in the said writ named, on the —— day of ——, in the year of our Lord ——, died seised of and in the said tenements with the appurtenances in the said writ specified, in his demesne as of fee, and that the said tenements with the appurtenances are of the clear yearly value in all issues beyond reprises of £300, and that three years are elapsed from the death of the said E. B. until the suing out of the said inquisition, and that the said A. B. has sustained damages by reason of the detaining of the said dower beyond the value aforesaid, and also over and above her costs and charges by her about her suit in this behalf expended, to £80, and for those costs and charges to 40*s*.

Final judgment. Therefore it is considered that the said A. B. recover against the said C. D. as well the value of the third part of the tenements aforesaid with the appurtenances from the time of the death of the said E. B. her late hus-

(g) See form, 2 Saund. Rep. 45, note 4; and 1 Rich. Prac. C. P. 4th edit. 435, 436, 437; Morg. Prec. 586; and see a form of judgment where defendant confesses right to dower, 1 Rich. C. P. 4th edit. 437 to 439.

band until the suing out of the said inquisition, which said value amounts to £300, and her damages aforesaid to £82, by the inquisition aforesaid in form aforesaid found, and also £100: 10*s.* by the Court here adjudged of increase to the said A. B. at her request, for her costs and charges aforesaid, which said value and damages in the whole amount to £482: 10*s.* &c.

Writ of seisin and inquiry of damages after judgment by default. (*h*)

Victoria &c. to the sheriff of Essex, greeting. Whereas A. B. widow, who was the wife of E. B. lately in our Court before —— lord —— and his companions our justices at Westminster, recovered her seisin against C. D. of the third part of [one messuage, one stable, fifteen acres of land, fifteen acres of meadow land, and fifteen acres of pasture land,] with the appurtenances, in the parish of T. in your county, as her dower, of the endowment of the said E. B. her late husband, by our writ of dower, whereof she has nothing, as by the record and process thereof now remaining in our said Court appears to us of record; therefore we command you that without delay you cause the said A. B. to have her full seisin of the said third part with the appurtenances, to hold to her in severalty by metes and bounds, and how you shall have executed this writ make known to our justices at Westminster on ——; we command you also, that by the oath of good and lawful men of your bailiwick you diligently inquire if the said E. B. the late husband of the said A. B. died seised of the said tenements with the appurtenances in fee-simple or fee-tail, and if by that inquisition you shall have so found them by their oath, that you diligently inquire how long time has elapsed from the time of the death of the said E. B., and how much the said tenements with the appurtenances are worth by the year in all issues beyond reprises according to their true value, and what damages the said A. B. hath sustained as well by occasion of the detention of her said dower beyond the said value, as for her costs and charges by her about her suit in this behalf expended, and the inquisition which you shall have thereupon made make known to our said justices at the said time under your seal and the seal of those by whose oath you shall have made that inquisition, and this writ. Witness, —— lord —— at Westminster, this —— day of ——, in the —— year of our reign.

Proceedings in dower in Manor Court. (*i*)

A requisition or demand to hold a Court having been made, the steward should issue his precept to the bailiff or beadle of the manor, commanding him to summon the several tenants who owe suit, that they personally appear. If the Court to be held be merely a general Customary Court, the notice may be as follows:—

Notice to suitors to appear.

Manor of ——. Notice is hereby given, that the next general Customary Court of —— Esq. the lord of the manor of ——, will be held in and for the said manor at ——, on &c. next ensuing the date of this notice, when

---

(*h*) See another form, 10 Wentw. 162; Thesaurus Brevium, 139; Clift. Ent. 301, 302; Booth, 168; 2 Sell. Prac. 1st edit. 303, &c.; 2d edit. 209, &c.; and 2 Saund. 45, note 4.

(*i*) As to the proceedings in dower in Manor Court, see 2 Watk. on Copyholds, 35; Co. Lit. a. 76; within what time they must be brought, 2 Watk. Cop. 37; Moore, 411; Gilb. Tenures, 178; 1 Vern. 195; remedy in dower in lord's court by plaint is proper; 2 Watk. 90, 91; 4 Co. Rep. 30 b; 3 Leon. 227. As to costs, see Mitford's Equity Treat. 111; Bac. Ab. Dower. As to the other proceedings in Manor Court, see *post*.

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and where the several customary tenants of the same manor are hereby required to do their accustomed suit.

Dated, &c. (Signed) G. H.
Steward of the same manor.

Before the Court is held the steward should prepare his minute book, and should enter therein the style of the Court to be holden; if the Court be intended merely for copyhold purposes, the style should run thus —

Style of Court, if for copyhold purposes only.

Manor of ——, } A general [*or* "special," *according to the fact,*]
in the county of ——. } Customary Court of ——, lord of the manor of —— aforesaid, held in and for the said manor on &c. before ——, steward of the manor aforesaid.

If a Court Baron be held with a Customary Court, the style may be as follows :—

Style if Court Baron be held with Customary Court.

Manor of ——. A Court Baron and general [*or* "special," *according to the fact,*] Court of ——, lord of the manor of —— aforesaid, held in and for the said manor, on &c.

PRESENT.

O. P. chief steward of the said manor,
Q. R. }
S. T. } Free suitors, sworn.
U. V. }
X. Y. }
&c. } Copyhold tenants, sworn.

M. N. Beadle, &c.

2 Watk. 52.

The Court being sitting, and silence enjoined, the suitors who appear should then be sworn on their homage, but a foreman should first be chosen and sworn, and the oath may be as follows:

Oath of foreman of homage.

"You ——, as foreman of this homage, shall truly present all such matters and things as are presentable at this Court, as the same are already known to you, or during the sitting of this Court shall come to your knowledge; you shall present nothing out of malice, nor conceal any thing from favour or affection, but in all things present the truth, the whole truth, and nothing but the truth, according to your information and belief.

"So help you God."

Then the suitors shall be sworn, two or three at a time, as follows :—

"You, and each of you, shall truly present &c. as before." [*If any of the suitors or homage be Quakers, their affirmation may be taken.* 2 Watk. on Copyh. 34, n.]

Proclamation to make plaint.

After the homage have been sworn, proclamation should be made for those who have plaints to enter them, which proclamation may be made, by the steward as follows:—

"If any person will enter any plaint, let him come forth, and he shall be heard." (Scroggs on Courts, 42, 196.)

The widow demanding her dower should then deliver, or cause to be

delivered, the draft of the plaint and prayer of process to the steward, which may be as follows:—

Plaint in dower in Manor Court, and prayer of process. (k)

Manor of —— in the parish of &c., and county of &c. } A. B. of &c. widow, who was the wife of E. B. deceased, complains against C. D. of a plea of land, and demands the third part of [two messuages, two dwelling-houses, two barns, two stables, two cow-houses, two orchards, two gardens, 100 acres of land, &c.] with the appurtenances, situate, lying and being within the manor of —— aforesaid, and within the jurisdiction of this Court of the same manor, of which said premises the said E. B. died seised, at the will of the lord of the said manor, according to the custom of the said manor, and to a third part of which the said A. B. is entitled as her free-bench, according to the custom of the same manor, and the said A. B. makes protestation to follow the plaint according to law, in the nature of a writ of dower, and the custom of the said manor, and there are pledges to prosecute, to wit, John Doe and Richard Roe, and the said A. B. prays that process may be made to her against the said C. D. according to the custom of the same manor, and that the said C. D. may be summoned by good summoners to answer to her the said A. B. thereupon.

Memorandum thereon, made in steward's book.

The following memorandum should then be made in the steward's book:—

Therefore, according to the custom of the said manor, it is commanded to ——, the bailiff of the said manor and the officer of this Court, that according to the custom of this manor, he summon the said C. D. by good summoners, that he be here at the next Court of this manor, to be holden on &c. next, to answer the said A. B. in the plea aforesaid, the same day is given to the said C. D. here &c.

Summons.

The next Court having been appointed, the steward should then issue a summons returnable at such next Court, which should be within a reasonable time from the holding of the first, the summons may be as follows:—

Manor of ——, in the county of ——. } To wit, O. P. steward of the said manor, to H. I. bailiff or officer of the Court of and belonging to the said manor, greeting:—Because A. B. of &c. widow, who was, as she alleges, the wife of &c. deceased, complains against C. D. of a plea of land, and demands against him the third part of two messuages &c. situate &c. and within the jurisdiction of this Court, of which said premises the said E. B. died seised, and to a third part of which the said A. B. is entitled as her free-bench, as she alleges, according to the custom of the said manor; therefore I command you, that according to the custom of the said mannor, you summon the said C. D. by good summoners, that he be at the next Court of this manor, to be holden in and for the said manor, at &c. on &c. to answer the said A. B. in the plea aforesaid, and have then and there the summoners, and this writ. Given under my hand and seal, this —— day of —— in the —— year &c.

(k) See form, 2 Watk. on Copyhold, 35; Co. Litt. s. 76.

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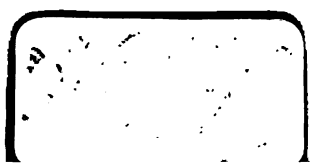
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